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Chronological List of Relevant Docket Entries

71 Civ. 992 Patrick Mc L. Dougall, et al. v. Jule M. Sugarman, et al.

DATE	PROCEEDINGS
1971	
Mar. 5	Filed Complaint. Issued Summons.
Mar. 5	Filed plttfs Order to Show Cause. Re: Class Action. Ret. 3-9-71.
Mar. 8	Filed summons and copy of complaint with acknowledgment of receipt by Personnel Director, N.Y. City Dept. of Personnel on 3/8/71.
Mar. 9	Filed (in court) Supplemental Affidavits.
Apr. 23	Filed defts Notice of Motion. Re: Dismiss Complaint. Ret. 5-4-71.
May 24	Filed OPINION #37677. Tenney, J. It seems clear that a 3-judge court should be convened to consider the substantial constitutional questions presented herein. Accordingly, I will notify the Chief Judge of this Circuit that a 3-Judge court ought to be convened pur. to Sec. 2284 of Title 28 USC. So ordered. (mailed notice).
May 27	Filed Designation of Judges in addition to the Hon. Charles H. Tenney, to hear and determine this cause as provided by law: Hon. J. Edward Lumbard, U.S.C.J., and Hon. Edward C. McLean, U.S.D.J. for SDNY. (mailed notice).
June 4	Filed order that plttfs' motion for declaratory judgment, etc. will be heard before the court of three judges duly designated on 7-13-71, in courtroom 129. All briefs in support of and in opposition to the motion shall be served and filed not later than 6-28-71, etc. So ordered. Tenney, J.
June 9	Filed Statutory Notice of Hearing by a 3-judge court for 7-13-71 before Lumbard, C.J., McLean, D.J. and Tenny, D.J. in courtroom 129 U.S. Court House, Foley Square, N.Y.

Chronological List of Relevant Docket Entries

DATE	PROCEEDINGS
July 1	Filed Memorandum of Law of Municipal Defendants.
July 1	Filed Notice of Motion re: Summary Judgment dismissing action. Ret. 7/13/71 in Room 129 at 4 o'clock.
July 1	Filed plttfs' Memorandum of Law.
July 2	Filed Memorandum of Law on behalf of N.Y. State Atty. General in support of constitutionality of N.Y. Civil Service Law.
July 13	Before three judge court, Lumbard, Ch. J., McLean, J., Tenney, J. Hearing held and concluded. Decision Reserved.
Nov. 9	Filed OPINION #38011. 3-judge court—Lumbard, Cir. J., McLean, D.J., Tenney, D.J. Plaintiffs' motion for class action, preliminary and permanent injunctive relief is hereby granted. SETTLE ORDER ON NOTICE. (mailed notice).
Dec. 23	Filed Order that defts, their successors, etc. are permanently enjoined; Ordered that the three judge court is hereby dissolved and all claims for relief are remanded to the single district judge to whom the motion for the convening of a three judge court was originally presented, the Honorable Charles H. Tenney; and Ordered that execution of this order is STAYED pending a timely appeal by the defendant to the U.S. Supreme Court. So Ordered Lumbard, C.J., McLean, D.J., Tenney, D.J.
1972	
Jan. 19	Filed Notice of Appeal to the Supreme Court of the U. S. by defts. Jule M. Sugarman, Admr. of N. Y. C. Human Resources Administration, and Harry I. Bronstein, City Director of Personnel and Chairman of the New York City Civil Commission.
Jan. 21	Filed Defts Notice of Appeal. (mailed notices)

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DATE

PROCEEDINGS

- Feb. 18 Certified record on appeal to Supreme Court of the U. S.
- Feb. 20 Filed true copy of order of Supreme Court of the United States. The appeal from the U.S.D.C. S.D.N.Y. The statement of jurisdiction in this case having been submitted and considered, probable jurisdiction is noted.

Amended Complaint

THE UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

PATRICK MC L. DOUGALL, ESPERANZA JORGE, TERESA VARGAS,
and SYLVIA COSTRO, individually and on behalf of all
other persons similarly situated,

Plaintiffs,

against

JULE M. SUGARMAN, Administrator of New York City
Human Resources Administration and HARRY I. BRON-
STEIN, City Director of Personnel and Chairman of the
New York City Civil Service Commission,

Defendants.

I

PRELIMINARY STATEMENT

Plaintiffs, individually and on behalf of all other persons similarly situated, seek to have this court declare invalid and enjoin the enforcement of New York State Civil Service Law § 53 which denies appointment for any position in the competitive class of Civil service jobs to any non-citizen. The statute is challenged on the grounds that it is in conflict with provisions contained in the First and Fourteenth

Amended Complaint

Amendment of the Constitution of the United States, and the Immigration and Nationality Act of 1952, as amended 8 U.S.C. § 1101, et seq.

II

JURISDICTION

Jurisdiction is conferred upon the Court as follows;

(a) 28 U.S.C. § 1331 in that the damages to each plaintiff exceeds \$10,000 and the matter arises under the United States Constitution, laws and treaties.

(b) 28 U.S.C. § 1343(3)(4) in that plaintiffs seek relief under 42 U.S.C. § 1981 and § 1983 in that plaintiffs allege deprivations under color of state laws, of rights, privileges or immunities secured by the Constitution of the United States or by Act of Congress providing for equal rights or civil rights of all persons within the jurisdiction of the United States.

(c) Plaintiffs' action for declaratory and injunctive relief, and for damages, is authorized by:

(a) 28 U.S.C. §§ 2201, 2202 and Rule 57 of the Federal Rules of Civil Procedure, which relate to declaratory judgments;

(b) 42 U.S.C. § 1983 which provides redress for the deprivation under color of law of rights, privileges and immunities secured to all citizens and persons within the jurisdiction of the United States by the Constitution and laws of the United States.

III

CLASS ACTION

Plaintiffs bring this action as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of themselves and other similarly situated who include all

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lawful resident aliens who are or were employed by State and the City of New York and also includes all lawful United States resident aliens who seek employment with the State of New York and its various local governments. The persons in the class are so numerous as to make joinder impractical and there are common questions of law and fact and plaintiffs' claims are typical of the claims of the class. The plaintiffs will fairly and adequately protect the interests of the class. The parties opposing the class have refused to act, or threaten to refuse to act on grounds generally applicable to the class.

IV

THREE JUDGE COURT

This is a proper case for determination by a three-judge court pursuant to 28 U.S.C. §§ 2281, 2284 since plaintiffs seek an injunction to restrain defendants, who are, for the purpose of this action state officers from the enforcement, operation and execution of a state statute (New York State Civil Service Law § 53) of state-wide applicability on the ground that said statute is contrary to the Constitution of the United States.

V

PLAINTIFFS

The named plaintiff, Patrick Mc L. Dougall, is a resident non-alien properly registered with the United States Immigration Authorities. He was born in Georgetown, Guyana, and is 43 years of age. He has resided in New York City since 1964. He was employed by the Manpower Career and Development Agency of the New York City Human Resources Administration as an Administrative Assistant in the Staff Development Unit and earned an annual salary in excess of \$5,000 per annum.

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The named plaintiff, Esperanza Jorge, is a resident alien of the United States and properly registered with the United States Immigration Authorities. She is 22 years of age and was born in Las Matas de Farfan, Dominican Republic. She has resided in New York City since March 24, 1967. She was employed as a Human Resources Technician in the Manpower and Career Development Agency of the New York City Human Resources Administration, and earned an annual salary in excess of \$5,000.

The named plaintiff, Teresa Vargas, is a resident alien of the United States and properly registered with the United States Immigration Authorities. She is 24 years of age and was born in Santo Domingo, Dominican Republic. She has resided in New York City since December 8, 1963. She was employed as a Clerk Typist in the Manpower and Career Development Agency of the New York City Human Resources Administration, and earned an annual salary in excess of \$5,000.

The named plaintiff, Sylvia Castro, is a non-resident alien properly registered with the Immigration Authorities of the United States. She is 26 years of age and was born in San Salvador, El Salvador. She has resided in New York City since March, 1967. She was employed as a Senior Human Resources Technician in the Manpower and Career Development Agency of the New York City Human Resources Administration, and earned an annual salary in excess of \$5,000.

VI

DEFENDANTS

1. The defendant Jule M. Sugarman is the Administrator of the New York City Human Resources Administration.

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2. Defendant Harry L. Bronstein is the City Director of Personnel and Chairman of the New York City Civil Service Commission.

3. Defendant Sugarman, is charged with enforcement of Civil Service Law § 53 in his department in which all of the named plaintiffs are employed.

4. Defendant Bronstein is charged with enforcement of Civil Service Law § 53 in all agencies and departments of New York City.

VII

FACTUAL ALLEGATIONS

1. Civil Service Law § 53 makes United States Citizenship a requirement for appointments to any Civil Service position in the competitive class in New York State.

2. Plaintiffs Patrick Mc L. Dougall, Esperanza Jorge, Teresa Vargas, Sylvia Castro and all other persons similarly situated are resident aliens of the United States.

3. Prior to December 20, 1970 the named plaintiffs had positions in various non-profit organizations which received funds through New York City Human Resources Administration from the United States Office of Economic Opportunity.

4. On or about December 28, 1970 the Office of Economic Opportunity funds ceased.

5. Sometime in November the defendant Sugarman and his agents informed all employees of said non-profit organizations that they would be employed by the City.

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6. All of said employees including the named plaintiffs were informed that they would be insured of employment and of similar salaries.

7. On or about February 11, 1971, the director of personnel of the New York City Human Resources Administration Harold O. Basden called the plaintiffs and others together and informed them that they would be dismissed in compliance with New York State Civil Service Law § 53 (1).

8. All of the named plaintiffs were employees of the Manpower and Career Development Agency of the New York City Human Resources Administration up to and including March 5, 1971.

9. All the named plaintiffs are fully qualified for the jobs they held with the City of New York and were discharged solely because they are not United States citizens.

10. Discharge of the plaintiffs has resulted in irreparable harm to them in that they will be unable to work at the jobs which they have held for several years and for which they are qualified. Moreover, the plaintiffs as aliens will have great difficulty in finding similar or other employment.

11. Plaintiffs and all other resident aliens, who would otherwise be qualified cannot obtain employment from the City of New York merely because they are not citizens of the United States.

VIII

FIRST CAUSE OF ACTION

For a first cause of action plaintiffs allege:

1. The New York Civil Service Law § 53 provides that in order to be eligible for appointment and employment in

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a Civil Service position in a competitive class persons must be citizens of the United States.

2. This provision creates two classes of persons for purposes of such appointment and employment: one class composed of qualified United States citizens and another class composed of qualified non-citizens.

3. Qualified persons who in all other ways qualify for appointment are denied appointment in New York solely because they are not citizens.

4. These qualified persons who are denied appointment are indistinguishable from those who are appointed except for their lack of citizenship.

5. No adequate state justification exists for this arbitrary classification scheme embodied in Civil Service Law, § 53 and hence it is invalid under the equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

6. By impermissibly denying individuals their right to such appointment § 53 works a denial of due process guaranteed by the Fourteenth Amendment to the Constitution of the United States.

IX**SECOND CAUSE OF ACTION**

For a second cause of action plaintiffs allege:

1. The New York Civil Service Law § 53 denies aliens their right to travel within the geographic boundaries of the United States.

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2. In denying employment to aliens in a substantial area of the employment market, to wit, civil service employment, the defendants and the state inhibit the rights of aliens to enter and settle within the boundaries of New York State.

3. This exercise of control of aliens right to travel denies aliens rights, privileges and immunities guaranteed by the United States Constitution and laws.

X**THIRD CAUSE OF ACTION**

For a third cause of action plaintiffs allege:

1. In denying employment to aliens, the state law is regulating the actions and activities of aliens.

2. The power to regulate the actions and activities of aliens lies solely with the United States Congress and the federal government.

3. § 53 of the New York Civil Service Law is in violation of the United States Immigration and Naturalization Act.

XI**PRAYER FOR RELIEF**

WHEREFORE, plaintiffs respectfully pray, on behalf of themselves and all others similarly situated, that this Honorable Court:

1. Assume jurisdiction of this cause, convene a three-judge district court pursuant to 28 U.S.C. §§ 2281 and 2284

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to determine this controversy, and set this case down promptly for a hearing.

2. Determine by order, pursuant to Rule 23 (c) (1) of the Federal Rules of Civil Procedure, that this action be maintained as a class action.

3. Pending a hearing and determination by the three-judge court, grant a temporary restraining order pursuant to 28 U.S.C. § 2284 (3) restraining defendants, their successors in office, agents and employees, and all other persons in active concert and participation with them, from continuing to cause irreparable harm to plaintiff and other persons similarly situated by refusing to employ them in civil service positions in the competitive class to which they are entitled and that would otherwise be available except for the fact that they are not citizens of the United States.

4. Enter a final judgment pursuant to 28 U.S.C. §§ 2201 and 2204 and Rules 54, 57 and 58 of the Federal Rules of Civil Procedure declaring that Civil Service § 53 is invalid on the grounds that it is violative of provisions contained in the First and Fourteenth Amendment to the United States Constitution and the laws of the United States.

5. Enter preliminary and permanent injunctions, pursuant to Rule 65 of the Federal Rules of Civil Procedure, enjoining defendants, their successors in office, agents and employees, and all other persons in active concert and participation with them from refusing to appoint and employ plaintiffs and all persons similarly situated in civil service positions in the competitive classification on the grounds that they are not citizens of the United States.

6. Grant each plaintiff damages of \$10,000 as represented by lost earnings resulting from their discharge from employment.

Order to Show Cause

7. Grant plaintiffs and all persons similarly situated such additional alternative relief, as may seem to this court to be just, proper and equitable.

Respectfully submitted,

LESTER EVENS
 MFY Legal Services, Inc.
 Lester Evens, Esq.
 Jeffrey G. Stark, Esq.

(Verified by Esperanza Jorge on March 15, 1971.)

Order to Show Cause for Class Action Order, to Convene Three-Judge Court and for Temporary Restraining Order

CIVIL ACTION No. 71 Civ. 992

THE UNITED STATES DISTRICT COURT,
 SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

Upon the verified complaint and affidavits of Patrick Mc L. Dougall, Esperanza Jorge, Teresa Vargas and Sylvia Castro it is

ORDERED, that the defendants Jule M. Sugarman and Harry I. Bronstein show cause in Room 506 of the United

Order to Show Cause

States Courthouse at Foley Square on the 9th day of March, 1971 at 10:00 o'clock in the forenoon or as soon thereafter as counsel can be heard, why an order should not issue or the court take such other action as shall grant the Plaintiffs herein the following relief:

1. An order pursuant to Rule 23(c) (1) of the Federal Rules of Civil Procedure determining that this action may properly proceed as a class action pursuant to Rule 23(a), (b) (2) because: the class, consisting of all alien residents residing in the State of New York who are employed by the City of New York or who would be employed but for New York State Civil Service Law § 53 that requires them to be citizens of the United States, is so numerous that joinder of all members is impracticable; there are questions of law and fact common to the class; the claims of the representative party are typical of the claims of the class; the representative parties will fairly and adequately protect the interests of the class; and the parties opposing the class has acted on grounds generally applicable to the class, making appropriate final injunctive and declaratory relief with respect to the class as a whole.

2. The convening of a statutory court of three judges for the purpose of hearing and determining this application for a preliminary and permanent injunction and this cause, in accordance with the provisions of Title 28, United States Code, Sections 2281 and 2284 which require the convening of such a court when an interlocutory and permanent injunction are sought to restrain a state officer from the enforcement of a statewide statute that is alleged to conflict with the Constitution of the United States. The preliminary and permanent injunction are sought to restrain the Defendants, who are state officers, their suc-

Order to Show Cause

cessors in office, agents and employees, and all other persons in active concert and participation with them, from terminating employment or refusing to grant employment to the Plaintiffs and all persons similarly situated solely on the ground that they are not citizens of the United States as required by New York State Civil Service Law § 53.

3. A temporary restraining order pursuant to Title 28, United States Code, Section 2284(3) restraining the Defendants, their successors in office, agents and employees, and all other persons in active concert and participation with them from terminating employment, pending the hearing and determination by a three-judge court convened pursuant to Title 28, United States Code, Sections 2281 and 2284, to give the Plaintiffs and all persons similarly situated on the grounds that they are not citizens of the United States as required by New York State Civil Service Law § 53.

Plaintiffs seek this relief for themselves and all others similarly situated on the grounds that:

(a) they and all others similarly situated are each suffering, or are threatened with imminent suffering, of irreparable damage in that they are without employment with which to provide themselves and their families and will continue to suffer even greater deprivation unless they can maintain their present positions or obtain employment from the City of New York for which would otherwise qualify.

(b) the issuance of a temporary restraining order will not cause undue inconvenience or loss to the Defendants but will prevent irreparable damage to the Plaintiffs and others similarly situated;

Order to Show Cause

(c) the statute (N.Y.S. Civil Service Law § 53) that deprives Plaintiffs and all others similarly situated of employment by the City of New York violates the Fourteenth Amendment of the Constitution of the United States.

(d) Plaintiff has no adequate remedy at law, as set forth more fully in the verified complaint and the affidavits of Patrick McL. Dougall, Esperanza Jorge, Teresa Vargas and Sylvia Castro, attached hereto.

ORDERED, ADJUDGED AND DECREED THAT, pending hearing and determination of Plaintiffs' motion for an order determining this matter to be a proper class action, an order convening a three-judge court and for an order restraining Defendants from terminating employment of Plaintiffs and all others similarly situated,

ORDERED, that service of this Order on Defendants on or before the 5th day of March, 1971, be deemed sufficient.

Dated: New York, N. Y.

March 5, 1971

MARVIN E. FRANKEL
United States District Judge

**Affidavit of Patrick Mc L. Dougall in Support of
Order to Show Cause**

**THE UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.**

[S A M E T I T L E]

**STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:**

PATRICK MC L. DOUGALL, being duly sworn, deposes and says:

- 1. He is one of the plaintiffs in the above-entitled action.**
- 2. He is a resident alien of the United States and is properly registered with the United States Immigration authorities.**
- 3. He is 43 years of age, having been born in Georgetown, Guyana on September 27, 1927.**
- 4. He has been a resident of the City of New York since 1964, presently residing at 340 Hudson Walk, Brooklyn, New York.**
- 5. At the time of his entry into the United States and thereafter he was self-supporting.**
- 6. From April, 1968, until the present, deponent has been employed by the Manpower and Career Development Agency of the New York City Human Resources Administration as an administrative assistant in the staff Development Unit.**

Affidavit of Patrick Mc L. Dougall

7. On or about February 11, 1971, deponent was informed by Harold O. Basden, the Personnel Director of the New York City Human Resources Administration, that his employment was terminated because he was not a citizen of the United States, as required by New York State law.

8. At the meeting with Mr. Basden, aforesaid, Mr. Basden stated that deponent's employment would be terminated on March 5, 1971.

9. Deponent, as required by his employer, did take a Civil Service Examination for the position of Senior Human Resources Specialist. Deponent's employer, Manpower and Career Development Agency, informed deponent by publication of a list in November, 1970, that deponent had passed the examination.

10. That deponent is trained and experienced in the career development of underprivileged persons and has no other skill or qualifications that would enable him to obtain employment at a comparable level of responsibility and salary with his present position.

11. That deponent is being discharged solely because he is not a citizen of the United States.

12. That deponent will be irreparably harmed as he has no opportunity to find other similar employment and he as well as his wife and five children will be without any means of support.

13. No prior application has been made for the relief sought herein.

WHEREFORE, deponent respectfully prays this court to restrain defendants from discharging deponent and all

Affidavit of Sylvia Castro

other persons similarly situated because of non-citizenship in the United States, to confer a three-judge court and to treat this proceeding as a class action and for such other and further relief as the court may deem just and proper.

(Sworn to by Patrick Mc L. Dougall on March 4, 1971.)

**Affidavit of Sylvia Castro in Support of Order
to Show Cause**

THE UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

SYLVIA CASTRO, being duly sworn, deposes and says:

1. She is one of the plaintiffs in the above entitled action.
2. She is a resident alien of the United States and is properly registered with the United States Immigration authorities.
3. She is 26 years of age, having been born in San Salvador, El Salvador on June 3, 1944.
4. She has been a resident of New York City, since March, 1967, presently residing at 1380 Merriam Avenue, Bronx, New York.

Affidavit of Sylvia Castro

5. At the time of her entry into the United States and thereafter, she was self-supporting.

6. That deponent was originally employed on June 16, 1969, by the Puerto Rican Forum in the Manpower program. Said employer is, upon information and belief, a non-profit membership corporation and was funded through the City of New York with federal funds from the Office of Economic Opportunity.

7. That on or about the 28th day of December, 1970, deponent's employment was transferred to the New York City Human Resources Administration.

8. Subsequently, on or about February 11, 1971, deponent, together with about twenty-five (25) others, was informed by the Director of Personnel of the Human Resources Administration that deponent's employment was being terminated on March 5, 1971. The reason given was that deponent is a non-citizen of the United States and as an employee of the City of New York since December 28, 1970, deponent's position was now under Civil Service. That the laws of the State of New York prohibited employment of non-citizens in Civil Service jobs.

9. That deponent is presently employed as a Senior Human Resources Technician and was also employed prior to December 28, 1970 by her former employer in the same position.

10. That deponent was originally employed by her former employer, Puerto Rican Forum, as an assistant counselor. Said employer then trained deponent, on the job, for her present employment.

11. That deponent is irreparably harmed because she cannot obtain a position of similar skill, responsibility and

Affidavit of Teresa Vargas

salary other than in a Civil Service position and that her status as a resident alien results in discrimination in employment against her.

12. No prior application has been made for the relief sought herein.

WHEREFORE, deponent respectfully prays this court to restrain defendants from terminating her employment and the employment of all others similarly situated, to convene a three-judge court and to treat this matter as a class action and for such other and further relief as this court may deem just and proper.

(Sworn to by Sylvia Castro on March 4, 1971.)

**Affidavit of Teresa Vargas in Support of Order
to Show Cause**

THE UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

TERESA VARGAS, being duly sworn, deposes and says:

1. She is one of the plaintiffs in the above titled action.

Affidavit of Teresa Vargas

2. She is a resident alien of the United States and is properly registered with the United States Immigration authorities.
3. She is twenty-four (24) years of age, having been born in Santo Domingo, Dominican Republic on June 23, 1946.
4. She has been a resident of the City of New York since December 8, 1963 residing at 203 West 109th Street, New York, New York.
5. At the time of her entry into the United States and thereafter she was self-supporting except during the period approximately from June, 1968 until June, 1969 when deponent was stricken by rheumatic fever and given financial assistance by the Department of Social Services.
6. That deponent was originally employed on November 16, 1970 by the Puerto Rican Forum in the Manpower program. Said employer is, upon information and belief, a non-profit membership corporation and was funded through the City of New York with federal funds from the Office of Economic Opportunity.
7. That on or about the 28th day of December, 1970, deponent's employment was transferred to the New York City Human Resources Administration.
8. Subsequently, on or about February 11, 1971 deponent, together with about twenty-five (25) others, was informed by the Director of Personnel of the Human Resources Administration that deponent's employment was being terminated on March 5, 1971. The reason given was that deponent is a non-citizen of the United States and as

Affidavit of Teresa Vargas

an employee of the City of New York since December 28, 1970, deponent's position was now under Civil Service. That the laws of the State of New York prohibited employment of non-citizens in Civil Service jobs.

9. That deponent is presently employed as a Clerk-Typist and was also employed prior to December 28, 1970 by her former employer in the same position.

10. That when deponent was originally employed by her former employer, Puerto Rican Forum, she was trained, on the job, for her present position.

11. That deponent shall suffer irreparable harm as a result of her termination of employment. That she will be unable to obtain similar employment from other New York City or New York State agencies because of the discriminatory nature of the existing Civil Service laws.

12. No prior application has been made for the relief sought herein.

WHEREFORE, deponent respectfully prays this court to restrain defendants from terminating her employment and the employment of all others similarly situated, to convene a three-judge court and to treat this matter as a class action and for such other and further relief as this court may deem just and proper.

(Sworn to by Teresa Vargas on March 4, 1971.)

**Affidavit of Esperanza Jorge in Support of Order
to Show Cause**

THE UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

[S A M E T I T L E]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

ESPERANZA JORGE, being duly sworn, deposes and says:

1. She is one of the plaintiffs in the above-titled action.
2. She is a resident alien of the United States and is properly registered with the United States Immigration authorities.
3. She is 22 years of age, having been born in Las Matas de Farfan, Dominican Republic on November 15, 1948.
4. She has been a resident of the City of New York since March 24, 1967, presently residing at 106-02-37th Avenue, Corona, New York.
5. At the time of her entry into the United States and thereafter she was self-supporting.
6. That deponent was originally employed on May 19, 1969 by the Puerto Rican Forum in the Manpower program. Said employer is, upon information and belief, a non-profit membership corporation and was funded through the City of New York with federal funds from the Office of Economic Opportunity.
7. That on or about the 28th day of December, 1970, deponent's employment was transeferred to the New York City Human Resources Administration.

Affidavit of Esperanza Jorge

8. Subsequently, on or about February 11, 1971 deponent, together with about twenty-five (25) others, was informed by the Director of Personnel of the Human Resources Administration that deponent's employment was being terminated on March 5, 1971. The reason given was that deponent is a non-citizen of the United States and as an employee of the City of New York since December 28, 1970, deponent's position was now under Civil Service. That the laws of the State of New York prohibited employment of non-citizens in Civil Service jobs.

9. That deponent is presently employed as a Human Resources Technician and was also employed prior to December 28, 1970 by her former employer in the same position.

10. That when deponent was originally employed by her former employer, Puerto Rican Forum, as a clerk-typist. Said employer then trained deponent, on the job, for her present employment.

11. That deponent is irreparably harmed because she cannot obtain a position of similar skill, responsibility and salary other than in a Civil Service position and that her status as a resident alien results in discrimination in employment against her.

12. No prior application has been made for the relief sought herein.

WHEREFORE, deponent respectfully prays this court to restrain defendants from terminating her employment and the employment of all others similarly situated, to convene a three-judge court and to treat this matter as a class action and for such other and further relief as this court may deem just and proper.

(Sworn to by Esperanza Jorge on March 4, 1971.)

Affirmation of Lester Evens, Esq. in Support of Order to Show Cause

Lester Evens, duly licensed to practice law in the State of New York and an attorney in good standing admitted to practice before the United States District Court for the Southern District of New York, affirms and says as follows:

That he one of the attorneys for the Plaintiffs herein.

That he familiar with facts in this case bases upon conversations with the plaintiffs and with certain of their immediate superiors.

That some of the plaintiffs have shown the affirmant letters they have received from their employer, the Human Resources Administration, notified them that there employment had been terminated on various days in February, 1971. That said plaintiffs have been told orally by their supervisors that the dates in the letters were wrong and that their employment would actually be terminated on March 5, 1971. Other plaintiffs received no letters but were informed informally that their employment would end on March 5, 1971.

That he has contacted a supervisor of some of the plaintiffs, by telephone, who informed him that the City of New York does not give formal notices of Termination of employment and that in fact the plaintiffs and all others in similar circumstances will be terminated on March 5, 1971.

That he believes that unless the Defendants are restrained from firing plaintiffs and all others similarly situated they shall suffer irreparable harm.

That the reason Plaintiffs make this application for a temporary restraining order is that irreparable harm will be done to them by the threatened termination in that they will be without employment and that they have no opportunity for new employment with the City of New York and will not be able to support themselves or their families.

Supplemental Affidavit of Achamma Chandersekaran

That upon information and belief affirmant's associate Eugene Murphy did contact the Corporation Counsel of the City of New York and was informed by an assistant corporation counsel Mr. Nespole, that he would appear at 2:30 P.M. in the Judge's chambers and that he would inform all the necessary parties of this application.

Affirmed under the penalties of perjury this 5th day of March, 1971.

LESTER EVENS

**Supplemental Affidavit of Achamma Chandersekaran,
in Support of Order to Show Cause**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

ACHAMMA CHANDERSEKARAN, being duly sworn, deposes and says:

1. That she is a lawfully registered resident alien, residing at D-703 Kings Highway Towers, Maple Shade, New Jersey.

2. That she entered the United States in September of 1962 as a student and had at that time a student visa.

Supplemental Affidavit of Achamma Chandersekaran

3. In December of 1969, her status was changed to permanent resident and that is her status as of the date of this affidavit.

4. Deponent married on April 4, 1970 and her maiden name, which she had used prior to April 4, 1970, was Achamma Cochuvava Coilparampil.

5. That her Immigration and Naturalization Registration number is #A-12 948 967.

6. Since November 13, 1968, deponent has been employed by Robert B. Mitchell, a prime contractor with the Department of City Planning of the City of New York. That since November 13, 1968 deponent did actually work at the offices of the Department of City Planning at 2 Lafayette Street, New York, New York.

7. As prime contractor Mr. Robert B. Mitchell, upon information and belief, had approximately eighty (80) employees working for him on projects for the New York City Department of City Planning.

8. Upon information and belief at least ten (10), and perhaps more, persons employed by Mr. Mitchell are resident aliens who like deponent, reside within the United States.

9. Sometime in October, 1970, deponent was informed, together with all other employees of Robert B. Mitchell, that on or about March 31, 1971 all of Mr. Mitchell's employees would become part of the permanent staff of the Department of City Planning and would have Civil Service status.

Supplemental Affidavit of Achamma Chandersekaran


10. On or about January 9, 1971 deponent was called to the office of Peter S. Richards, Administrative Director of the Department of City Planning and she was informed by Mr. Richards and the Executive Director, Edward Robin, that because of her status as a non-citizen she could not be employed by the Department of City Planning.
11. Since January 9, 1971 deponent has made strenuous effort to seek employment from other employers. Such other employers included private concerns as well as public agencies and has been unable to obtain employment because of the acute shortage of available positions for her skill and training.
12. Deponent has also written to the Mayor of the City of New York and the Governor of the State of New York and has received replies, see letter of February 10, 1971 and March 8, 1971, attached, stating that because of deponent's alienage and the requirements of the New York State Civil Service Law, nothing could be done to help her. The letters further state that unless there is a waiver because of a shortage of qualified applicants then nothing could be done for deponent.
13. Deponent was originally employed by the contractor Robert B. Mitchell as a research assistant and sometime in June, 1969, deponent was promoted to junior city planner. At the time deponent and the other employees were notified of the transfer of their employment to the City of New York deponent was informed that she would again be promoted to an assistant city planner.
14. Deponent's experience and skills both in research and in city planning uniquely suit her for government employment. Although there may be some private employers

Supplemental Affidavit of Achamma Chandersekaran

who use city planners such positions are extremely scarce and upon information and belief, none are presently available. The main source of employment for deponent as a city planner is with the government.

15. Deponent has been irreparably damaged by the requirement of the New York State Civil Service Law which prohibits her, so long as she is not a citizen, from obtaining employment with either the State of New York or any of the local governments within the State.

(Sworn to by Achamma Chandersekaran on March 22, 1971.)



Notice of Motion to Dismiss Amended Complaint**THE UNITED STATES DISTRICT COURT,****SOUTHERN DISTRICT OF NEW YORK.**

[S A M E T I T L E]

SIRS:

PLEASE TAKE NOTICE that upon the Amended Complaint filed herein, the annexed affidavit of Harold O. Basden, sworn to April 5, 1971, with Schedule, and upon all the papers and proceedings heretofore had herein, the undersigned will move this Court, at Room 506, United States Court House, Foley Square, New York, N.Y. on the 4th day of May 1971, at 10 o'clock in the forenoon of that day or as thereafter as counsel can be heard for an order pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure dismissing the action on the ground that the Court lacks jurisdiction over the subject matter and for such other, further and different relief as to the Court may seem just and proper.

Dated: New York, New York, April 5, 1971.

J. LEE RANKIN
Corporation Counsel
Attorney for Defendants

To:

LESTER EVENS, Esq.
JEFFREY G. STARK, Esq.

**Affidavit of Harold O. Basden in Opposition to Order
to Show Cause and in Support of Motion to Dis-
miss Amended Complaint**

THE UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

[S A M E T I T L E]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

HAROLD O. BASDEN, being duly sworn, deposes and says, that he is the Director of Personnel of the Human Resources Administration of the City of New York, and as such, he is thoroughly familiar with the facts herein.

1. This affidavit is submitted in opposition to plaintiffs' motion for a temporary restraining order under 28 U.S.C. § 2284 (3) enjoining the termination of their employment with the Manpower Career Development Agency (a division of the Human Resources Administration) and for orders convening a three judgment under 28 U.S.C. § 2281 and determining that plaintiffs are a proper class under F.R.C.P. 23(a), (b) (2). It is submitted in support of defendants' motion to dismiss the Amended Complaint under F.R.C.P. 12(b) (1) on the ground that the Court lacks jurisdiction over the subject matter.

2. The named plaintiffs are four of a group of twenty non-citizens who were employed by the Manpower Career Development Agency ("MCDA"). Between February 11, 1971 and March 5, 1971, each of the twenty was advised that his services were terminated subject to continuation on payroll status until accrued annual leave and compen-

Affidavit of Harold O. Basden

satory time had been paid. The date on which each of the twenty left, or will leave, payroll status is set forth in the accompanying Schedule. As the Schedule shows, only plaintiffs Dougall and Jorge currently remain on payroll status.

3. The twenty non-citizens came into the City civil service on December 28, 1970 when two programs, previously administered by the Puerto Rican Forum ("PRF") and the Institute for Public Administration ("IPA"), were absorbed by MCDA.

The purpose of the PRF and IPA program was the development of job skills among unemployed and underemployed individuals. The programs provided job training, counseling and placement services. They were administered on a regional, or neighborhood, basis and were assisted with federal funds. The Manpower Career Development Agency administered a similar, more centralized job training program on behalf of the City.

In late 1970, the PRF and IPA programs were jeopardized by the loss of their federal funds, and it was mutually agreed that they should be merged with the parallel City program at MCDA.

As a result of the merger of the programs, 450 employees from PRF and IPA were transferred to the City civil service, among them the twenty non-citizens described above.

4. The transferred employees were appointed to pre-existing titles in professional, technical and clerical categories within MCDA. The titles are classified in the competitive class of the civil service (N. Y. Civil Service Law § 44), and the appointments were made on a provisional basis (N. Y. Civil Service Law § 65). The titles and annual salaries of each of the twenty non-citizens are set forth on the schedule.

5. N. Y. Civil Service Law § 53 provides, *inter alia*, that only United States citizens are eligible for appointment to

Affidavit of Harold O. Basden

positions in the competitive class unless the municipal commission determines that there is an acute shortage of qualified personnel available to fill a particular class, or particular classes, of positions. In the event of such a shortage, the commission may waive the citizenship requirement subject to the conditions set forth in subdivision 2 of Section 53. (See also Rule 3.4.4 of the Rules and Regulations of the Department of Personnel and the City Civil Service Commission).

6. Personnel investigation of the 450 employees transferred from PRF to IPA revealed that twenty of the group were not United States citizens as indicated on the Schedule. There was no shortage of qualified personnel for the professional, technical and clerical positions to which the transferred employees had been appointed. Accordingly, the twenty non-citizens were declared ineligible, their appointments revoked and their services terminated as described in paragraph "2" above.

7. There are eligible lists in existence for all the titles to which the transferred employees were appointed except the title of Typist. An eligible list for that title will be established shortly. Upon information and belief the persons whose names appear on the aforesaid eligible lists are citizens of the United States and are otherwise fully qualified for appointment. (See N. Y. Civil Service Law § 61, subd. 1 and Rule 4.6.1 of the Rules and Regulations of the Department of Personnel and City Civil Service Commission.)

8. In the event that plaintiffs ultimately succeed in this action, they will be reinstated to their former positions with an appropriate award for backpay.

(Sworn to by Harold O. Basden on April 5, 1971.)

Schedule Annexed to Basden Affidavit

SCHEDULE

<i>Name</i>	<i>Date of Entry</i>	<i>Type of Visa</i>	<i>Position</i>	<i>Annual Salary</i>	<i>Date On Pay</i>
Jose Arias	3/13/65	Immigrant	Sr. HRT	\$ 8,200	2/18/66
Frank Bido	8/ 7/68	Resident	HRT	6,400	3/23/69
Sylvia Castro	9/29/65	Resident	Sr. HRT	8,200	2/19/66
Alberto Charles	7/ 4/57	Immigrant	HRS	8,200	3/17/68
Hazel Collins	8/25/65	Resident	Sr. HRT	8,200	3/ 3/66
Patrick Dougall			Sr. HRS	10,700	4/ 6/66
Melvina Douglas	4/ 4/68	Resident	Typist	5,200	3/11/69
Nightingale Guzman	6/15/63	Resident	Sr. HRS	10,700	3/25/68
Ernesto Hernandez	11/18/52	Resident	HRT	6,400	3/ 3/66
Esperanza Jorge	3/24/67	Resident	Sr. Clerk	6,400	4/15/68
Morikee Karouma	11/ /60	Resident	Supv. HRS	12,100	7/16/68
Ivy Lewis	3/12/66	Resident	Sr. HRS	10,300	3/ 5/68
Veive Mbaera	5/19/63	Vol. Dep. Status	HRS	8,500	2/26/68
Aubrey Mitchell	6/ 8/52	Resident	HRS	8,500	2/16/68
Otwane Omulepu	9/15/60	Immigrant	Supv. HRS	12,100	3/ 5/68
Maria Ongay	8/21/67	Immigrant	HRS	9,350	3/ 1/68
Lilia Sanchez	7/19/68	Resident	HRS	9,000	3/ 5/68
Carmen Termine	11/17/62	Immigrant	Typist	5,240	2/26/68
Hugh Thompson	1/10/61	Resident	HRS	10,300	2/26/68
Theresa Vargas	12/ 8/63	Resident	Typist	5,600	2/26/68

Explanation:

"HRT" is Human Resources Technician

"Sr. HRT" is Senior Human Resources Technician

"HRS" is Human Resource Specialist

"Sr. HRS" is Senior Human Resource Specialist

"Supv. HRS" is Supervising Human Resource Specialist

**Affirmation of Jeffrey G. Stark, Esq. in Opposition
to Motion to Dismiss Amended Complaint**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[S A M E T I T L E]

JEFFREY G. STARK, an attorney duly admitted to practice law in the Southern District of New York, and the courts of the State of New York, hereby affirms under penalty of perjury:

1. This affirmation is offered in opposition to defendants' motion to dismiss the amended complaint for lack of jurisdiction.

2. The affidavit of Harold Basden, dated March 29, 1971, and annexed to defendants' motion to dismiss, admits the central allegations of plaintiffs' complaint—that plaintiffs were dismissed from employment with the City of New York solely on the ground that they were not United States citizens. Said affidavit further admits, see paragraphs 6 and 7, that the positions plaintiffs formerly occupied, Human Resources Specialist, Senior Human Resource Specialist and Senior Clerk can in the future be filled by citizen applicants. The conclusion is clear that the sole employment for which plaintiffs are qualified and for which they have been trained is no longer available to them. This case thus differs markedly from *Tichon v. Harder*, 308 F. Supp. 839 (D.C. Conn. 1970). In the case at hand, the denial of employment with the City of New York constitutes a denial of the only meaningful opportunity for employment available to plaintiffs.

Affirmation of Jeffrey G. Stark

3. The proximate loss of meaningful opportunity for employment, and the direct loss of wages, is sufficient ground to sustain the jurisdiction of this court under 28 U.S.C. § 1331. Defendants do not dispute that the action herein arises under the laws and the Constitution of the United States.

4. Jurisdiction of this Court is equally secured by 42 U.S.C. §§ 1981, 1983, and their jurisdictional counterparts 28 U.S.C. §§ 1343 (3), (4). 42 U.S.C. § 1981, which provides that:

“All persons within the jurisdiction of the United States shall have the same right in every State and territory to make and enforce contracts . . . and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . .”

has repeatedly been held applicable to discrimination in employment, see e.g., *Arrington v. Massachusetts Bay Transp. Auth.*, 306 F. Supp. 1355 (D. Mass 1969), *Young v. Int'l Tele and Telegraph Co.*, 39 U.S.L.W. 2489 (3rd Cir. 2/11/71), and specifically to discrimination against aliens. *Takahashi v. Fish and Game Commission*, 68 S.Ct. 1138 (1948). 42 U.S.C. § 1983, which clothes the District Courts with jurisdiction of claims alleging “a deprivation of a right guaranteed by the Fourteenth Amendment”, *Monroe v. Pape*, 365 U.S. 167, 171, has been held to sustain federal jurisdiction over a conspiracy to deprive a doctor of his employment, *Kletchka v. Driver*, 411 F.2d 436 (2nd Cir. 1969), a conspiracy to abrogate a teacher's contractual rights, *Cobb v. City of Malden*, 202 F.2d 701 (1st Cir. 1953), and see *Bomar v. Keyes*, 162 F.2d 136 (2nd Cir.) and the unlawful denial or revocation of liquor licenses, *Hornsby v. Allen*, 326 F.2d 695 (5th Cir. 1964), *Glicker*

Affirmation of Jeffrey G. Stark

v. *Michigan Liquor Control Comm.*, 160 F.2d 96 (6th Cir. 1947). "[D]eprivation of the personal liberty to pursue a calling" is cognizable under § 1983. *Gold v. Lomenzo*, 425 F.2d 959, 961 (2nd Cir. 1970) (revocation of broker's license).

5. Finally, abstention is clearly inappropriate in the case at hand. The federal courts are the primary forum for the vindication of federal rights, and must give "due respect to a suitor's choice of that forum". *Zwickler v. Koota*, 389 U.S. 241. "As a consequence it is now widely recognized that 'cases involving vital questions of civil rights' are the least likely candidates for abstention." *Holmes v. N.Y.C. Housing Authority*, 398 F.2d 262 (2nd Cir. 1968). The exception is where the state statute on its face is so ambiguous as to require prior interpretation by a state court. See generally Moore's Federal Practice § 57.18(2) and cases collected therein. Where, however, the state statute is unambiguous and where the only issue is whether the statute can "pass muster under the due process clause of the Fourteenth Amendment", the Federal Court is the "primary forum for vindicating federal rights." *Escalera v. N.Y.C. Housing Authority*, 425 F.2d 853 (2nd Cir. 1970). The statute in issue is absolutely unambiguous and could not be construed to avoid constitutional doubts.

WHEREFORE, it is respectfully prayed defendants' motion be denied in all respects.

JEFFREY G. STARK
Jeffrey G. Stark

Dated: New York, New York, May 12, 1971.

Opinion and Order of Single District Judge

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

APPEARANCES

For Plaintiffs:

MOBILIZATION FOR YOUTH LEGAL SERVICES, INC.

759-10th Avenue

New York, N. Y.

Lester Evens

Jeffrey G. Stark, Esqs.—of Counsel.

For Defendants:

J. LEE RANKIN, Esq.

Corporation Counsel of The City of New York

Municipal Building

New York, N. Y. 10007

Judith A. Gordon, Esq.—of Counsel.

TENNEY, J.

Plaintiffs, individually and on behalf of all others similarly situated,¹ move this Court pursuant to 28 U.S.C. §§ 2281 and 2284 for an order convening a district court of three judges for the purpose of hearing and determining their application for a preliminary and permanent injunction to restrain defendants from continued enforcement of Section 53 of the New York Civil Service Law.²

Basing jurisdiction upon 28 U.S.C. §§ 1343(3), (4); 42 U.S.C. § 1983, and 28 U.S.C. § 1331, plaintiffs seek to

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prevent defendants from depriving them of their rights as "person[s] . . . [entitled to] . . . due process of law . . . [and] equal protection of the laws" under the Fourteenth Amendment to the United States Constitution. Furthermore, plaintiffs contend that defendants' enforcement of Section 53 denies aliens the right to travel within the United States and encroaches upon the exclusive right of Congress to regulate immigration and naturalization.

In substance, plaintiffs claim that Section 53, which makes non-citizens ineligible for appointment to any position in the competitive class of civil service in New York City, discriminates against aliens residing in the City. More specifically, plaintiffs urge that their discharge from employment merely because they are not American citizens violated their rights to due process and equal protection under the Fourteenth Amendment since American citizens admittedly would not have been discharged.⁴ *Yick Wo v. Hopkins*, 118 U. S. 356 (1886). It is further contended that enforcement of Section 53 infringes upon plaintiffs' right to travel among the states, as that right has been recognized in *United States v. Guest*, 383 U. S. 745 (1965) and *Truax v. Raich*, 239 U. S. 33 (1915). Finally, Section 53 is viewed by plaintiffs as encroaching upon the Congressional scheme for immigration and naturalization and hence must be declared void. *Truax v. Raich*, *supra*; *Purdy & Fitzpatrick v. State*, 79 Cal. Rptr. 77, 456 P.2d 645, 653 (1969).

Defendants, on the other hand, cross-move for dismissal of the within action on the grounds this Court lacks subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1343(3), (4). In addition, defendants contend that no substantial federal question requiring the convening of a three-judge court is presented by the within complaint.

We turn first to the motion to dismiss which, if granted, would dispose of the entire action. It appears unlikely

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that plaintiffs can meet the \$10,000 jurisdictional requirement of 28 U.S.C. § 1331, since the claims of the class members, being separate and distinct, may not be added together, *Snyder v. Harris*, 394 U. S. 332 (1969); *Catalano v. Dep't of Hospitals*, 299 F. Supp. 116, 169 (S.D.N.Y. 1969). Furthermore, since the salary of the highest paid discharged member of the class is \$12,100 per annum and, as of the filing of the complaint, no member of the class had been off the payroll for more than three weeks, it is clear that no individual class member can presently meet the \$10,000 requirement. Moreover, if any class member is subsequently employed by a private employer he may never reach the requisite amount since his lost wages will never reach \$10,000. Finally, it is doubtful whether the future lost wages of which the individual class members may be deprived could be considered by this Court in computing the amount in controversy. *Cf. Eisen v. Eastman*, 421 F.2d 560, 566 (2d Cir. 1969); *Kochhar v. Auburn Univ.*, 304 F. Supp. 565, 567 (D. C. Ala. 1969).

I find defendants' reliance on *Tichon v. Harder*, Docket No. 35151 (2d Cir. Feb. 18, 1971), for dismissing the within action for lack of jurisdiction under 28 U.S.C. § 1343(3), misplaced. In that case, the plaintiff, a case worker in the Connecticut Department of Welfare, claimed she was denied procedural due process when the State fired her. The Court of Appeals, in affirming the dismissal of that action, held that § 1343(3) did not provide jurisdiction since only rights of personal liberty can be asserted under that section when one claims he has been denied procedural due process. "[T]he claim that appellant was denied procedural due process has no independent jurisdictional significance. . . ." *Tichon v. Harder*, *supra* at 1550. Clearly, the loss of employment is a property right vis-a-vis a right of personal liberty. However, plaintiffs contend not merely that they were denied procedural due process, but that they

Opinion and Order of Single District Judge

were also denied equal protection of the laws when the City discriminated against them. This, of course, involves a matter of personal liberty. See *Arrington v. Massachusetts Bay Transp. Auth.*, 306 F. Supp. 1355 (D. Mass. 1969). To hold otherwise would permit the City to dismiss an employee because of his race and yet offer him no opportunity for redress in the federal courts unless the matter in controversy satisfied the \$10,000 jurisdictional requirement of § 1331. Furthermore, such a holding would fly in the face of the very language of § 1343(3) and that of the Fourteenth Amendment.

I conclude, therefore, that this Court does in fact have jurisdiction, under 28 U.S.C. § 1343(3), of the instant action. *Madison v. Wood*, 410 F.2d 564, 567 (6th Cir. 1969); *Penn. v. Stumpf*, 308 F. Supp. 1238, 1244-46 (N.D. Cal. 1970); cf. *Davenport v. Berman*, 420 F.2d 294, 296 (2d Cir. 1969).

The next issue is whether the plaintiffs' complaint raises a substantial constitutional question necessitating the convening of a three-judge court. In a recent unanimous decision, *Purdy & Fitzpatrick v. State*, 79 Cal. Rptr. 77; 456 P.2d 645 (1969), the California Supreme Court held that a state statute prohibiting the employment of aliens on public works was unconstitutional in that it: (1) offended the equal protection clause of the Fourteenth Amendment of the United States Constitution, and (2) interfered with the congressional scheme for immigration and naturalization. There has also been a recent adoption of stricter standards of judicial review in cases dealing with "suspect classifications" or "fundamental interests". *Keyishian v. Bd. of Regents*, 385 U. S. 589 (1967); *Takahashi v. Fish & Game Comm.*, 334 U. S. 410, 420 (1948); *Hawkins v. Town of Shaw*, 39 U.S.L.W. 2431 (5th Cir. Feb. 9, 1971); See generally, *Developments in the Law—Equal Protection* 82 Harv. L. Rev. 1065 (1969). Under this standard, the state

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must show the classification is necessary to a compelling state interest, rather than merely demonstrate a reasonable relation between the restriction and any possible valid state interest. Defendants argue, however, that the standard applies only to classifications which penalize the exercise of specific constitutional or fundamental rights and not with respect to public employment. Again, the defendants fail to perceive the gravamen of the instant action—denial of equal protection of the laws. "While there may be no constitutional right to public employment as such, there is a constitutional right to be free from unreasonably discriminatory practices with respect to such employment." *Whitner v. Davis*, 410 F.2d 24, 30 (9th Cir. 1969).

In light of the recent ruling of the California Supreme Court and the other noted developments in equal protection, it seems clear that a three-judge court should be convened to consider the substantial constitutional questions presented herein.

Accordingly, I will notify the Chief Judge of this Circuit that a three-judge court ought to be convened pursuant to Section 2284 of Title 28 of the United States Code.

So ordered.

Dated: New York, New York
May 24, 1971.

CHARLES H. TENNEY
U.S.D.J.

Opinion and Order of Single District Judge

FOOTNOTES

¹ Pg. 1. The determination as to whether the case is appropriately brought as a class action and, if so, the propriety of the definition of the class, is deferred for decision by the three-judge court.

² Pg. 2. N. Y. CIVIL SERVICE LAW § 53 (McKinney 1970)
"Citizenship requirements.

1. Except as herein otherwise provided, no person shall be eligible for appointment for any position in the competitive class unless he is a citizen of the United States.

2. . . ."

³ Pg. 3. 28 U.S.C. § 1343, in pertinent part, provides:

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) . . .

(2) . . .

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

⁴ Pg. 3. The relevant language of the Fourteenth Amendment provides:

"[N]or [shall any State] deny to any *person* within its jurisdiction the equal protection of the laws." (Emphasis supplied.)

Answer of Municipal Defendants

**THE UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.**

[S A M E T I T L E]

Defendants, Jule M. Sugarman, Administrator of the New York City Human Resources Administration, and Harry I. Bronstein, New York City Personnel Director and Chairman of the New York City Civil Service Commission, answering the Amended Complaint herein by their attorney, J. Lee Rankin, Corporation Counsel, respectfully allege:

FIRST: Deny each and every allegation in paragraph "I" except admit that plaintiffs, individually and on behalf of all other persons similarly situated, seek to have this Court declare invalid and enjoin the enforcement of New York State Civil Service Law § 53 and that said statute is challenged on the grounds that it conflicts with the provisions contained in the First and Fourteenth Amendments of the Constitution of the United States, and the Immigration and Nationality Act of 1952, as amended, 8 U.S.C. § 1101, et seq.

SECOND: Deny each and every allegation in paragraph "II(a)" except admit that the matter arises under the United States Constitution.

THIRD: Deny each and every allegation in paragraphs "II(b)" and "II(c)", subparagraph "(b)" insofar as said paragraphs allege that 28 U.S.C. § 1343 (3) and (4) and 42 U.S.C. §§ 1981 and 1983 provide a basis for the Court's jurisdiction.

Answer of Municipal Defendants

FOURTH: Deny each and every allegation in paragraph "III" except admit that plaintiffs purport to bring this action as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure and that plaintiffs define said class as themselves and others similarly situated who include all lawful resident aliens who are or were employed by the State and City of New York and also includes all lawful United States resident aliens who seek employment with the State of New York and its various local governments.

FIFTH: Upon information and belief, deny each and every allegation in paragraph "V" except admit as follows:

The named plaintiff Patrick McL. Dougall, is a resident alien properly registered with the United States Immigration Authorities, that he was born in Georgetown, Guyana and that he was employed by the Manpower Career Development Agency of the New York City Human Resources Administration at an annual salary in excess of \$5,000 per annum.

The named plaintiff, Esperanza Jorge is a resident alien properly registered with the United States Immigration Authorities, that she was twenty-two years old at the time of the commencement of this action and that she was employed by the Manpower Career Development Agency of the New York City Human Resources Administration at an annual salary in excess of \$5,000. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations that plaintiff was born in Las Matas de Farfan, Dominican Republic, and that she has resided in New York City since March 24, 1967.

The named plaintiff Teresa Vargas is a resident alien properly registered with the United States Immigration Authorities, that she was twenty-four years old at the

Answer of Municipal Defendants

time of the commencement of this action and that she was employed by the Manpower Career Development Agency of the New York City Human Resources Administration as a Typist at an annual salary in excess of \$5,000. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations that plaintiff was born in Santo Domingo, Dominican Republic and that she has resided in New York City since December 8, 1963.

The named plaintiff Sylvia Castro is a resident alien properly registered with the United States Immigration Authorities, that she was twenty-six years old at the time of the commencement of this action, that she has resided in New York City at least since March, 1967 and that she was employed by the Manpower Career Development Agency as a Senior Human Resources Technician at an annual salary in excess of \$5,000.

SIXTH: Deny each and every allegation in paragraph "VII" subparagraph "1".

SEVENTH: Upon information and belief, deny each and every allegation in paragraph "VII" subparagraphs "5" and "6".

EIGHTH: Upon information and belief, deny each and every allegation in paragraph "VII" subparagraph "8" except admit that plaintiffs Dougall and Jorge were on City payroll status up to and including March 5, 1971.

NINTH: Deny each and every allegation in paragraph "VII", subparagraphs "9", "10" and "11".

TENTH: Deny each and every allegation in paragraph "VIII" and all the subparagraphs therein.

Answer of Municipal Defendants

ELEVENTH: Deny each and every allegation in paragraph "IX" and all subparagraphs therein.

TWELFTH: Deny each and every allegation in paragraph "X" and all the subparagraphs therein.

FACTUAL ALLEGATIONS

THIRTEENTH: The named plaintiffs are resident aliens.

FOURTEENTH: Plaintiffs came into the City civil service on or about December 28, 1970 when two privately sponsored job training programs were merged with a similar City sponsored program. (A description of the programs and the reasons for their merger are set forth at paragraph "3" of the affidavit of Harold O. Basden, Director of Personnel of the N.Y.C. Human Resources Administration, sworn to April 5, 1971, hereinafter "Basden affidavit").*

FIFTEENTH: Upon entry into the City civil service, plaintiffs were appointed provisionally to competitive class titles within the Manpower Career Development Agency of the N.Y.C. Human Resources Administration. (See Basden affidavit at paragraph "4" and annexed Schedule, columns "3" and "4".)

SIXTEENTH: Each of the plaintiffs completed a form provided by the N.Y.C. Department of Personnel entitled "Request for Approval of Provisional, Exceptional, Seasonal, Temporary or Military Replacement Appointment."

* The Basden affidavit was submitted on defendants' earlier motion to dismiss the action for lack of subject matter jurisdiction. It is resubmitted with defendants' Answer for the convenience of the Court and the parties.

Answer of Municipal Defendants

Each form requires the applicant to list the previous positions he has held which "tend to qualify [him] for the position sought" and further requires the applicant to attest to the truth of the information provided. (The "Request for Approval of Provisional, Exceptional, Seasonal, Temporary or Military Replacement Appointment", hereinafter "Request for Provisional Appointment", submitted to the Department of Personnel by each of the named plaintiffs is annexed hereto and made a part hereof marked Exhibits "1" (Dougall), "2" (Jorge), "3" (Vargas) and "4" (Castro).)

SEVENTEENTH: None of the plaintiffs was certified pursuant to 8 U.S.C. § 1182(a)(14) or related provisions of the Immigration and Nationality Act of 1952 for the title he held in the City civil service or for any similar position in the private sector.

EIGHTEENTH: Upon review of the Requests for Provisional Appointment, the N.Y.C. Department of Personnel learned that plaintiffs were not citizens of the United States. See Civil Service Law § 53, subd. 1.

NINETEENTH: From the time of plaintiffs' provisional appointments down to date, no waivers of United States Citizenship authorized by N.Y. Civil Service Law § 53, subd. 2, have been in effect with respect to the competitive class titles in which plaintiffs were employed.

TWENTIETH: Between February 11, 1971 and March 5, 1971, plaintiffs were advised that they were dismissed from the N.Y.C. Human Resources Administration subject to continuation on payroll status until accrued leave and compensatory time had been paid. (See Basden affidavit at paragraph "2" and Schedule, column "6".)

Answer of Municipal Defendants

TWENTY-FIRST: Plaintiffs' dismissals were required by the statutory mandate contained in Civil Service Law § 53.

TWENTY-SECOND: Plaintiff Castro was dismissed for the additional reason that she lacked sufficient experience to qualify for the position of Senior Human Resources Technician (Defendants' Exhibit "4", p. 1).

TWENTY-THIRD: Upon information and belief, only plaintiff Dougall took and passed a competitive examination for the position he held provisionally with the N.Y.C. Human Resources Administration. However, at the time of his dismissal, plaintiff Dougall retained his provisional status.

TWENTY-FOURTH: There are eligible lists in existence for all the titles formerly held by the plaintiffs except the title of Typist. Upon information and belief, an eligible list for that title will be established shortly.

TWENTY-FIFTH: Upon information and belief, the persons whose names appear on the aforesaid eligible lists are United States citizens and otherwise fully qualified for appointment.

FURTHER ANSWERING THE AMENDED COMPLAINT AND AS AND FOR A FIRST DEFENSE, DEFENDANTS RESPECTFULLY ALLEGE:

TWENTY-SIXTH: The Court lacks jurisdiction over the subject matter of this action.**

** This defense was raised on defendants' earlier motion to dismiss the action. It is repeated here for the convenience of the Court and the parties.

*Answer of Municipal Defendants***SECOND DEFENSE**

TWENTY-SEVENTH: N.Y. Civil Service Law § 53 is constitutional and does not contravene the Fourteenth Amendment to the United States Constitution.

THIRD DEFENSE

TWENTY-EIGHTH: N.Y. Civil Service § 53 is constitutional and does not contravene the First Amendment to the United States Constitution.

FOURTH DEFENSE

TWENTY-NINTH: N.Y. Civil Service § 53 is constitutional and does not deny plaintiffs the right to enter and reside within New York State and/or any of the political subdivisions thereof.

FIFTH DEFENSE

THIRTIETH: The power to pass laws affecting resident aliens does not rest solely with the United States Congress.

THIRTY-FIRST: The Immigration and Nationality Act of 1952, 8 U.S.C. § 1101 et seq., does not pre-empt the field of employment of resident aliens in state and local government.

THIRTY-SECOND: N.Y. Civil Service Law § 53 is not inconsistent with any provision of the Immigration and Nationality Act of 1952.

Answer of Municipal Defendants

SIXTH DEFENSE

THIRTY-THIRD: N.Y. Civil Service Law § 53 does not interfere with the power of the federal government to conduct the foreign relations of the United States.

SEVENTH DEFENSE

THIRTY-FOURTH: Assuming *arguendo* that the court finds that plaintiffs' civil rights have been violated by the operation of N.Y. Civil Service § 53, defendants Sugarman and Bronstein are immune from damages under 42 U.S.C. 1983 and 28 U.S.C. 1343(3) and (4). Said defendants acted in good faith and in accordance with the mandate of Civil Service § 53 at a time when said statute was presumed to be valid.

WHEREFORE, defendants pray for Judgment in their favor dismissing the action and awarding them costs.

Respectfully submitted,

J. LEE RANKIN
Corporation Counsel
Attorney for Defendants
Sugarman and Bronstein

Exhibit "1" Annexed to Answer*By E.O.P.
Date ByDo NOT WRITE HERE
Appl. No. [Illegible]**THE CITY OF NEW YORK
DEPARTMENT OF PERSONNEL
220 Church Street, New York, N. Y. 10013****REQUEST FOR APPROVAL OF PROVISIONAL, EXCEPTIONAL,
SEASONAL, TEMPORARY, OR MILITARY REPLACEMENT
APPOINTMENT****SECTION A—To be Filled in by Appointing Officer (NOTE:
Attach F.B.I. Fingerprint Form FD 258)**Dept. or Agency *Human Resources Administration (MDT)*Effective date of this appointment *12/28/70*Title of position *Sr. Human Resources Specialist*Title code No. *OB168* Eval. title code No.Position No. Salary *10,200* Pay gradeBorough work location *Manhattan*Appointment to be made under commission rule and for
reason checked below:

- ☒ 5. 5. 1 - Provisional - In a permanent vacancy ☐ 5. 4. 1 -
Temporary - Not to exceed one month ☐ 5. 6. 1 -
Seasonal ☐ 5. 4. 2 - Temporary - Leave of absence
for _____ months. Granted to _____
☐ 5. 7. 2 - Exceptional - For service outside N. Y. City

* The text from which Exhibits "1" through "4" were reproduced was illegible in part. The Court is respectfully referred to the original Exhibits filed with the record on this appeal for the portions marked "illegible" in the Appendix.

Exhibit "1" Annexed to Answer

☒ 5. 4. 3 - Temporary - Where position will exist for _____ months. ☐ Sec. 243 - Military leave of _____

Knowing the provisions of Section 95 of the Civil Service Law, and with full knowledge of the responsibility and liability placed upon me thereby, I certify that this appointment is properly made under the rule checked above; that I am familiar with the qualifications of the proposed appointee; that I believe the statements made to be true; his character and reputation are satisfactory; he has the requisite knowledge and ability; he meets the minimum education and experience requirements for the position; and that he will perform duties appropriate to his title.

The fingerprints of the appointee have been submitted to the Department of Personnel.

Signature, Appointing Officer **HAROLD O. BASDEN**

Title

Date 2/5/71

SECTION B (Personal History Section)—To be filled in by Applicant (Print in ink or type)

1. Name (First, Middle Initial, Last) *Patrick McL. Dougall*
2. Address (Include Borough and Zip Code No.) *340 Hudson Walk Brooklyn, N.Y. 11201*
3. Sex* ☒ Male ☐ Female
4. Date of Birth* *Sept. 27, 1927*
5. Describe physical defects or ailments, if any *None*

* The New York Law Against Discrimination prohibits discrimination because of age or sex, except where there is a bona fide occupational qualification or a statutory authorization.

Exhibit "1" Annexed to Answer

6. Are you now a bona fide resident of the State of New York? ☒ Yes ☐ No
7. Are you a citizen of the United States? ☐ Yes ☐ No
[Illegible]
8. Were you ever removed from or disqualified for any private or public employment? ☐ Yes ☒ No
9. Have you ever been treated for mental disease or been a patient in an institution for treatment of mental disease? ☐ Yes ☒ No

If your answer to question 8 or 9 is "yes", give full details below.

10. Are you a permanent City employee? ☐ Yes ☐ No
- 10A. If yes, state: Department Title of Permanent Position

SECTION C—For Department of Personnel

Payroll Division—Approved under Rule 5. 4. 1 for 30 days from effective date. Initials [Illegible] Date [Illegible]

Bureau of Examinations ☐ Qualified ☒ Not Qualified because lacks U.S. citizenship Initials: LF Date: 2.22.71

DECLARATION (To be completed by applicant)

I declare, under penalties of the penal law, that I prepared this side and the reverse side of the Personal History Section of this application and that the statements contained therein are, to the best of my knowledge and belief, true and correct and that I have not knowingly and willfully made a false statement or given information which I know to be false in connection therewith.

Signed PAT DOUGALL

Date 12/3/70

*Exhibit "1" Annexed to Answer***EDUCATION** Name of School

High School or Trade School *Washington High* Day or Night *D* From Mo. Yr. *1/40* To Mo. Yr. *12/44*
 Were You Graduated? (Yes or No) *Yes* Degree Received

Total Credits Completed Major Subject
 No. of Credits in Major

College or Other School *Birmingham Univ* Day or Night *D* From Mo. Yr. *9/50* To Mo. Yr. *12/50*
 Were You Graduated (Yes or No) *No* Degree Received

Total Credits Completed *10* Major Subject *Accountancy*
 No. of Credits in Major [illegible]

Cornell Univ Day or Night *N* From Mo. Yr. *3/70* To Mo. Yr. *6/70* Were you Graduated (Yes or No) *No*
 Degree Received Total Credits Completed *3*
 Major Subject *Sociology & Psychology* No. of Credits in Major *18* [illegible] No. of Credits in Major *3*

EXPERIENCE: List in chronological order, starting with your present or most recent position, those positions which tend to qualify you for the position sought. List as a separate employment every material change of duties with the same employer.

- [1] Dates of Employment (Give Month and Year) From *11/68* to *Present* Exact Title of Your Position *Administrative Assistant* Salary *\$10,700* Number of Hours Work Per Week *35 hrs* Name and Address of Employer *Manpower Career Dev. Agcy. 460 W. 42nd St. N.Y., N.Y.* Nature of Business *Training*. Number and Kind of Employees Supervised by You *25 Supervisors, trainers & clerical staff* If With New York City or State, Was This a Provisional Appointment? ☐ Yes ☐ No. Description of Your Work *Assist and advise team leaders with training preparation, [illegible] implementation of training and report to*

Exhibit "1" Annexed to Answer

Director, negotiate with Regional Directors, hold supervisory conference with unit personnel, responsible for time, payroll and general administration of unit.

- [2] Dates of Employment (Give Month and Year) From 11/66 to 11/68 Exact Title of Your Position *Work Preparation Counselor* Salary \$9,500 Number of Hours Work Per Week 35 hrs Name and Address of Employer *Ft. Greene Community Corp 609 Fulton St Brooklyn, N. Y.* Nature of business *Anti-Poverty* Number and Kind of Employees Supervised by You

If with New York City or State, Was This a Provisional Appointment? ☐ Yes ☐ No [Illegible] Description of Your Work *Interviewed clients from disadvantaged areas for vocational training and placement weighed and interpreted information obtained in* [Illegible]

- [3] Dates of Employment (Give Month and Year) From 1/62 to 10/66 Exact Title of Your Position *Accountant* Salary \$120 per wk Number of Hours Work Per Week 35 hrs Name and Address of Employer [Illegible] *Records and Audio Equipment 235 W. 119th St. NYC.* Nature of Business *Records & Audio Equipment* Number and Kind of Employees Supervised by You 2 If with New York City or State, Was This a Provisional Appointment ☐ Yes ☐ No Description of Your Work *Maintain accounts and records in such bookkeeping activities as recording disbursements, expenses, the payment and controls over inventories and purchases, verify orders, audit,* [Illegible] *and vouchers and prepared statements*

LICENSE: If a license or professional registration is required for this position, answer the following:

Exhibit "1" Annexed to Answer

Title of License you Possess (Valid in N. Y. C.)

License No.

Name of Issuing Agency

Date of Original Issue

Date Last Renewed

Renewal Number (if any)

Date of Expiration

Present any additional information on a separate sheet of this size and attach firmly.

DP-69 Attachment

Name *Patrick Mc[Illegible] Dougall*

Dates of Employment From *1/48* to *12/61*

Name & Address of Employer *Govt of Guyana P.O. Telecommunications Georgetown, Guyana*

Exact Title of Your Position *Asst Engineer & Asst Accountant* Salary *\$415 per week* No. Hrs. Worked Per Week *45 hrs* Nature of Business *Telecommunication* No. & Kind of Employees Supervised By You *45 Jr. Technicians* If N.Y. City of State, Was This a Provisional Appointment?—Yes/ / No/ /

Description of Your Work *Installing & Fitting Switch-Boards & Telephones in Businesses & Residences, Instructing Jr. Technicians on Installation Procedures and Submitting Cost of Installation and Overseas Indents*

Exhibit "2", Annexed to Answer.

DO NOT WRITE HERE
 Appl. No. 26721

PROCESSED BY E.D.P.

Date _____ By _____

THE CITY OF NEW YORK
 DEPARTMENT OF PERSONNEL
 220 Church Street, New York, N.Y. 10013

REQUEST FOR APPROVAL OF PROVISIONAL, EXCEPTIONAL, SEASONAL, TEMPORARY, OR MILITARY REPLACEMENT APPOINTMENT

SECTION A—To be Filled in by Appointing Officer (NOTE:
Attach F.B.I. Fingerprint Form FD-258)

Dept. or Agency *Hea-MCDA-Rms #5*

Effective Date of this Appointment *12/28/70*

Title of Position *Sr. Clerk*

Title Code No. *10111*

Eval. Title Code No. _____

Position No. _____

Salary *\$6,400*

Pay Grade _____

Borough Work Location *Manhattan*

Appointment to be made under Commission Rule and for reason check below:

- ☒ 5.5.1—Provisional—in a permanent vacancy
- ☐ 5.6.1—Seasonal
- ☐ 5.7.2—Exceptional—for service outside N. Y. City
- ☐ Sec. 243—military leave of _____

Exhibit "2" Annexed to Answer

- ☐ 5.4.1—Temporary—not to exceed one month
- ☐ 5.4.2—Temporary—leave of absence for _____ months,
granted to _____
- ☐ 5.4.3—Temporary—where position will exist for
months _____

Knowing the provisions of Section 95 of the Civil Service Law, and with full knowledge of the responsibility and liability placed upon me thereby, I certify that this appointment is properly made under the rule checked above; that I am familiar with the qualifications of the proposed appointee, that I believe the statements made to be true; his character and reputation are satisfactory; he has the requisite knowledge and ability; he meets the minimum education and experience requirements for the position; and that he will perform duties appropriate to his title.

The fingerprints of the appointee have been submitted to the Department of Personnel.

Signature, Appointing Officer *Harold O. Basden (A)*

Title Director of Personnel

Date 12/30/70

SECTION B (Personal History Section)—To be filled in by
Applicant (PRINT IN INK OR TYPE)

1. Name (First, Middle Initial, Last) *Esperanza I. Jorge*
2. Address (Include Borough and Zip Code No.) *106-03
37th Avenue, Corona, N.Y.C. 11368*

Exhibit "2" Annexed to Answer

3. Sex* ☐ Male ☒ Female
4. Date of Birth* 11-15-48
5. Describe physical defects or ailments, if any *None*
6. Are you now a bona fide resident of the State of New York? ☒ Yes ☐ No
7. Are you a citizen of the United States? ☐ Yes ☒ No
8. Were you ever removed from or disqualified for any private or public employment? ☐ Yes ☒ No
9. Have you ever been treated for mental disease or been a patient in an institution for treatment of mental disease? ☐ Yes ☒ No

If your answer to question 8 or 9 is "yes", give full details below.

10. Were you a permanent N. Y. City employee? ☐ Yes ☒ No

10A. If yes, state: Department
Title of Permanent Position

DECLARATION (To be completed by applicant)

I declare, under penalties of the penal law, that I prepared this side and the reverse side of the Personal History Section of this application and that the statements contained therein are, to the best of my knowledge and belief, true and correct and that I have not knowingly and willfully made a false statement or given information which I know to be false in connection therewith.

Signed *Esperanza I. Jorge*

Date *December 1, 1970*

* The New York Law Against Discrimination prohibits discrimination because of age or sex, except where there is a bona fide occupational qualification or a statutory authorization.

*Exhibit "2", Annexed to Answer***EDUCATION** Name of School

High School or Trade School [Illegible] Day or Night *D* From Mo. Yr. 9-63 To Mo. Yr. 6-66 Were You Graduated? (Yes or No) *No* Major Subject

College or Other School [Illegible] Day or Night *D* From Mo. Yr. 11-68 To Mo. Yr. 5-69 Were You Graduated? (Yes or No) *Yes* Major Subject

Spanish High School Inst. 215 W. 43rd St. N.Y.C. Day or Night *N* From Mo. Yr. 4-68 To Mo. Yr. 11-68 Were You Graduated (Yes or No) *No* Major Subject.

MCDA Seminar (10 Week) Day or Night *D* Were You Graduated? (Yes or No) *Certificate*

EXPERIENCE: List in chronological order, starting with your present or most recent position, those positions which tend to qualify you for the position sought. List as a separate employment every material change of duties with the same employer.

- 1 Dates of Employment (Give Month and Year) From 5/69 to Present Exact Title of Your Position *Data Collection Clerk* Salary \$6400 Number of Hours Work Per Week 35

Name and Address of Employer *MCDA-RNS #5 601 West 26 St. N.Y.C. 10001* Nature of Business *Anti-Poverty* Number and Kind of Employees Supervised By You If With New York City or State. Was This a Provisional Appointment? ☒ Yes ☐ No

Description of Your Work *Maintain Client Master File. Receive the Activity Status & Referral Forms. Verify*

Exhibit "2" Annexed to Answer

Any Terminations, Transfers, Graduations, Job Placement and Any Unspecified Items. Confirm Whether or Not the Above Items Are [Illegible]. Keeping a Weekly Activity Report, [Illegible]

- 2 Dates of Employment (Give Month and Year) From 12/6/8 to 5/69 Exact Title of Your Position *General Clerical* Salary *\$20.10 Wkly* Number of Hours Work Per Week *10 Hrs. (Part Time)*

Name and Address of Employer *American In-Store Serv- ing Corp. 230 Fifth Ave. N.Y.* Nature of Business *Commercial Business* Number and Kind of Employees Supervised By You If With New York City or State. Was This a Provisional Appointment?
☐ Yes ☒ No

Description of Your Work *Filing Work with the Zerox and Mimeograph Machine Send the Mail, Answer Phone, and a little type.*

LICENSEE: If a license or professional registration is required for this position, answer the following:

Title of License You Possess (Valid in N. Y. C.)
 License No.

Name of Issuing Agency

Date of Original Issue Date Last Renewed
 Renewal Number (If Any)

Date of Expiration

Present Any Additional Information on a Separate Sheet of This Size and Attach Firmly.

Exhibit "2" Annexed to Answer

SECTION C—For Department of Personnel

Payroll Division—Approved under Rule 5.4.1 for 30 days from effective date.

Initials [Illegible] Date [Illegible]

Bureau of Examinations

☐ Qualified

☒ Not Qualified

because

Does not meet citizenship requirement.

Initials: BG

Date: 12-31-70

Exhibit "3" Annexed to Answer

DO NOT WRITE HERE

PROCESSED BY E.D.P.

Appl. No. 26722

Date

By

THE CITY OF NEW YORK
DEPARTMENT OF PERSONNEL
220 Church Street, New York, N.Y. 10013

REQUEST FOR APPROVAL OF PROVISIONAL, EXCEPTIONAL, SEASONAL, TEMPORARY, OR MILITARY REPLACEMENT APPOINTMENT

SECTION A—To be Filled in by Appointing Officer (NOTE:
Attach F.B. I Fingerprint Form FD-258)

Dept. or Agency *HEA-MEDA-RMS #5*Effective Date of this Appointment *12/25/70*Title of Position *Steno*Title Code No. *10205* Eval. Title Code No.Position No. Salary *5600* Pay GradeBorough Work Location *Manhattan*

Appointment to be made under Commission rule and for reason checked below:

- ☒ 5.5.1—Provisional—in a permanent vacancy
☐ 5.4.1—Temporary—Not to exceed one month
☐ 5.6.1—Seasonal
☐ 5.4.2—Temporary—leave of absence for _____ months, granted to
☐ 5.7.2—Exceptional—for service outside N. Y. City
☐ 5.4.3—Temporary—where position will exist for _____ months
☐ Sec. 243—Military leave of

Knowing the provisions of Section 95 of the Civil Service Law, and with full knowledge of the responsibility and liability placed upon me thereby, I certify that this appointment is properly made under the rule checked

Exhibit "3" Annexed to Answer

above; that I am familiar with the qualifications of the proposed appointee; that I believe the statements made to be true; his character and reputation are satisfactory; he has the requisite knowledge and ability; he meets the minimum education and experience requirements for the position; and that he will perform duties appropriate to his title.

The fingerprints of the appointee have been submitted to the Department of Personnel.

Signature, Appointing Officer *Harold O. Basden (A)*
Title Director of Personnel

Date 12/30/70

SECTION B (Personal History Section)—To be filled in by Applicant (PRINT IN INK OR TYPE)

1. Name (First, Middle Initial, Last) *Teresa A. Vargas*
 2. Address (Include Borough and Zip Code No.) *203 West 109th Street New York, N. Y. 10025*
 3. Sex*
☐ Male ☒ Female
 4. Date of Birth* *6/23/46*
 5. Describe physical defects or ailments, if any
 6. Are you now a bona fide resident of the State of New York? ☒ Yes ☐ No
 7. Are you a citizen of the United States? ☐ Yes ☒ No
 8. Were you ever removed from or disqualified for any private or public employment? ☐ Yes ☒ No
- * The New York Law Against Discrimination prohibits discrimination because of age or sex, except where there is a bona fide occupational qualification or a statutory authorization.

Exhibit "3" Annexed to Answer

9. Have you ever been treated for mental disease or been a patient in an institution for treatment of mental disease? ☐ Yes ☒ No

If your answer to question 8 or 9 is "yes", give full details below.

10. Were you a permanent City employee? ☐ Yes ☒ No

10A. If yes, state: Department _____ Title of Permanent Position _____

SECTION C—For Department of Personnel

Payroll Division—Approved under Rule 5.4.1 for 30 days from effective date.

Initials _____ Date _____

Bureau of Examinations

☐ Qualified

☒ Not Qualified

because _____ failed to appear for [Illegible] 1/14/71

Initials: *RW*

Date: *1/18/71*

DECLARATION (To be completed by applicant)

I declare, under penalties of the penal law, that I prepared this side and the reverse side of the Personal History Section of this application and that the statements contained herein are, to the best of my knowledge and belief, true and correct and that I have not knowingly and willfully made a false statement or given information which I know to be false in connection therewith.

Signed *TERESA VARGAS*

Date *12/1/70*

*Exhibit "3" Annexed to Answer***EDUCATION** Name of School

High School or Trade School [Illegible] Day or Night *D*
 From Mo. Year 11/54 to Mo. Year 1962 (Were You
 Graduated? (Yes or No) *No* Major Subject

College or Other School *High School* Day or Night *D*
 From Mo. Year to Mo. Year 1/70 Were You Gradu-
 ated? (Yes or No) *Yes*. Major Subject

[Illegible] Day or Night *D* From Mo. Yr. 9/69 to Mo.
 Yr. 7/70 Were You Graduated? (Yes or No) [Il-
 legible] Major Subject

[Illegible] Day or Night *D* From Mo. Yr. 9/69 to Mo.
 Yr. 10/70 Were you graduated? (Yes or No)
 Major Subject

EXPERIENCE: List in chronological order, starting with
 your present or most recent position, those positions
 which tend to qualify you for the position sought.
 List as a separate employment every material change
 of duties with the same employer.

- 1 Dates of Employment (Give Month and Year) From
 [Illegible] to [Illegible] Exact Title of Your Position
 [Illegible] Salary \$5,150 Number of Hours Work
 Per Week 35

Name and Address of Employer *MCDA-RMS #5 601*
West 26 Street, New York 10001 Nature of Business
Anti-Poverty Number and Kind of Employees Super-
 vised by you If With New York City or State. Was
 This a Provisional Appointment? ☒ Yes ☐ No

Description of Your Work *Filing, Typing and Answering*
Phone

- 2 Dates of Employment (Give Month and Year) From
 to 3/70 Exact Title of Your Position *Clerk*
typist Salary \$90.00 Number of Hours Work Per
 Week 35

Exhibit "3" Annexed to Answer

Name and Address of Employer *Bank of New York, 10
Washington Street* Nature of Business [Illegible]
Number and Kind of Employees Supervised By You
If With New York City or State, Was
This a Provisional Appointment? ☐ Yes ☒ No.

Description of Your Work: *Typing, Filing*

3 Dates of Employment (Give Month and Year) From
3/68 to 5 or 6/67 Exact Title of Your Position *Gen-
eral Clerk With Diversified Duties* Salary *885.00*
Number of Hours Work Per Week *40*

Name and Address of Employer *Feature Rings, 139 West
46th Str., New York* Nature of Business *Factory*
Number and Kind of Employees Supervised By You
If With New York City or State, Was
This a Provisional Appointment? ☐ Yes ☒ No

Description of Your Work *Distribute* [Illegible] *Classi-
fied It, Filing, Up-Date the Files*

LICENSE: If a license or professional registration is re-
quired for this position, answer the following:

Title of License You Possess (Valid in N. Y. C.)
License No.

Name of Issuing Agency

Date of Original Issue

Date Last Renewed

Renewal Number (If Any)

Date of Expiration

Present Any Additional Information On a Separate Sheet
of This Size and Attach Firmly.

Exhibit "4" Annexed to Answer

DO NOT WRITE HERE
 Appl. No. 26618

PROCESSED BY E.D.P.

Date By

THE CITY OF NEW YORK
 DEPARTMENT OF PERSONNEL
 220 Church Street, New York, N. Y. 10013

REQUEST FOR APPROVAL OF PROVISIONAL, EXCEPTIONAL,
 SEASONAL, TEMPORARY, OR MILITARY REPLACEMENT
 APPOINTMENT

SECTION A—To be Filled in by Appointing Officer (NOTE:
Attach F.B.I. Fingerprint Form FP 268)

Dept. or Agency *HRA MCDD Rms #5* Effective date of
 this appointment *12/28/70*

Title of position *Sr. HRT (MDT)* Title code No. *03166*
 Eval. title code No.

Position No. Salary *6,800* Pay grade
 Borough work location *Manhattan*

Appointment to be made under commission rule and for
 reason checked below:

- ☒ 5. 5. 1 - Provisional - In a permanent vacancy
☐ 5. 4. 1 - Temporary - Not to exceed one month
☐ 5. 6. 1 - Seasonal
☐ 5. 4. 2 - Temporary - Leave of absence for months.
 Granted to
☐ 5. 7. 2 - Exceptional - For service outside N. Y. City
☐ 5. 4. 3 - Temporary - Where position will exist for
 months.
☐ Sec. 243 - Military leave of

Knowing the provisions of Section 95 of the Civil Service
 Law, and with full knowledge of the responsibility and

Exhibit "4" Annexed to Answer

liability placed upon me thereby, I certify that this appointment is properly made under the rule checked above; that I am familiar with the qualifications of the proposed appointee; that I believe the statements made to be true; his character and reputation are satisfactory; he has the requisite knowledge and ability; he meets the minimum education and experience requirements for the position; and that he will perform duties appropriate to his title.

The fingerprints of the appointee have been submitted to the Department of Personnel.

Signature, Appointing Officer HAROLD O. BASDEN Title
Director of Personnel Date 12/30/70

**SECTION B (Personal History Section)—To be filled in by
Applicant (Print in ink or type)**

1. Name (First, Middle Initial, Last) *Sylvia Castro*
2. Address (Include Borough and Zip Code No.) *1380
Merriam Ave. Apt. 3-G Bronx New York 10452*
3. Sex* ☐ Male ☒ Female
4. Date of Birth* *June 3, 1944*
5. Describe physical defects or ailments, if any *None*
6. Are you now a bona fide resident of the State of New York? ☒ Yes ☐ No
7. Are you a citizen of the United States? ☐ Yes ☒ No
8. Were you ever removed from or disqualified for any private or public employment? ☐ Yes ☒ No
9. Have you ever been treated for mental disease or been a patient in an institution for treatment of mental disease? ☐ Yes ☒ No

If you answer to questions 8 or 9 is "yes", give full details below.

- * The New York Law Against Discrimination prohibits discrimination because of age or sex, except where there is a bona fide occupational qualification or a statutory authorization.

Exhibit "4" Annexed to Answer

10. Are you a permanent City employee? ☐ Yes ☒ No

10A. If yes, state: Department Title of Per-
manent Position

SECTION C—For Department of Personnel

Payroll Division—Approved under Rule 5. 4. 1 for 30 days
from effective date.

Initials Date Dec 31 1970

Bureau of Examinations ☐ Qualified ☒ Not Qualified
because *not citizen &* (Illegible)

Initials: (Illegible) Date: 1.7.71

DECLARATION (To be completed by applicant)

I declare, under penalties of the penal law, that I prepared this side and the reverse side of the Personal History Section of this application and that the statements contained therein are, to the best of my knowledge and belief, true and correct and that I have not knowingly and willfully made a false statement or given information which I know to be false in connection therewith.

Signed SYLVIA CASTRO

Date December 1st, 1970

EDUCATION Name of School

High School or Trade School (Illegible) Day or Night *Day*
From Mo. 2 Yr. 1959 to Mo. 11 Yr. 1964 Were You
Graduated? (Yes or No) Yes Degree Received Total
Credits Completed Major Subject *General Edu-*
cation No. of Credits in Major

Public Service (Illegible) Day or Night *Day* From Mo.
4-15 Yr. 68 To Mo. 4 Yr. 1969 Were You Graduated
(Yes or No) (Illegible) Degree Received Total
Credits Completed Major Subject No. of
Credits in Major

*Exhibit "4" Annexed to Answer***College or Other School**

EXPERIENCE: List in chronological order, starting with your present or most recent position, those positions which tend to qualify you for the position sought. List as a separate employment every material change of duties with the same employer.

- 1 Dates of Employment (Give Month and Year) From 6-16-69 to Present

Exact Title of Your Position *Assistant Counselor*

Salary \$6,700

Number of Hours Work Per Week 35

Name and Address of Employer *M.C.D.A. Region No. 5
601 West 26th St.*

Nature of Business *Anti-Poverty*

Number and Kind of Employees Supervised By You

If with New York City or State, was this a Provisional Appointment? ☒ Yes ☐ No

Description of Your Work *Orientation and Assessment.
Individual Counseling. Group Counseling. Intake.*

- 2 Dates of Employment (Give Month and Year) From 4-15-68 to April, 1969

Exact Title of Your Position *Educational Assistant*

Salary \$70. Wkly.

Number of Hours Work Per Week 35

Name and Address of Employer *Public Service Career
Program 220 Church St. N.Y.C.*

Nature of Business *Anti Poverty*

Exhibit "4" Annexed to Answer

Number and Kind of Employees Supervised By You

If with New York City or State, was this a Provisional Appointment? ☒ Yes ☐ No

Description of Your Work *Assist the Teacher—Tutoring (At School) Basic Education Training in order to get the High School Equivalency Diploma.*

3 Dates of Employment (Give Month and Year) From *4/66 to 4/68*

Exact Title of Your Position *Packer*

Salary *\$64. Wkly.*

Number of Hours Work Per Week *35*

Name and Address of Employer *460 West 34th Street
New York*

Nature of Business *Factory*

Number and Kind of Employees Supervised By You

If with New York City or State, was this a Provisional Appointment? ☐ Yes ☒ No

Description of Your Work *Packing, General help*

LICENSE: If a license or professional registration is required for this position, answer the following:

Title of License You Possess (Valid in N.Y.C.)

License No.

Name of Issuing Agency

Date of Original Issue

Date Last Renewed

Renewal Number (If Any)

Date of Expiration

Present Any Additional Information on a Separate Sheet of This Size and Attach Firmly.

**Affidavit of Harold O. Basden Resubmitted
in Support of Answer**

(See pp. 31-33, *ante.*)

**Schedule Annexed to Basden Affidavit Resubmitted
in Support of Answer**

(See p. 34, *ante.*)

Motion for Summary Judgment Dismissing Action

**THE UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.**

[S A M E T I T L E]

PLEASE TAKE NOTICE that upon the annexed Answer with Exhibits "1" through "4" and upon the affidavit of Harold O. Basden, sworn to April 5, 1971, with Schedule, and upon all the papers and proceedings heretofore had herein, the undersigned will move this Court at Room 129, United States Courthouse, Foley Square, New York, N.Y., on the 13th day of July, 1971 at 4 o'clock in the afternoon of that day or as soon thereafter as counsel can be heard, pursuant to Rule 56 of the Federal Rules of Civil Procedure for summary judgment in defendants' favor dismissing the action on the ground that there is no genuine issue as to any material fact and that defendants are entitled to judgment as a matter of law.

Dated: New York, N.Y., July 1, 1971.

J. LEE RANKIN
J. Lee Rankin
Corporation Counsel
Attorney for Defendants
Sugarman and Bronstein

To:

LESTER EVENS, Esq.
JEFFREY G. STARK, Esq.
Attorneys for Plaintiffs

**Statement Under Rule 9(g) of the General Rules of
United States Court for the Southern and Eastern
Districts of New York**

**THE UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.**

[SAME TITLE]

By their attorney J. Lee Rankin, Corporation Counsel defendants Jule M. Sugarman, Administrator of the N.Y.C. Human Resources Administration, and Harry I. Bronstein, N.Y.C. Personnel Director and Chairman of the N.Y.C. Civil Service Commission, respectfully allege as follows for their statement under Rule 9 (g) of the General Rules of United States Courts for the Southern and Eastern Districts of New York.

1. The named plaintiffs are resident aliens.
2. Plaintiffs came into the City civil service on or about December 28, 1970 when private job training programs sponsored by the Puerto Rican Forum and the Institute for Public Administration were merged with a similar City sponsored program.
3. Plaintiffs were appointed provisionally to competitive class titles within the Manpower Career Development Agency of the N.Y.C. Human Resources Administration.
4. The dates of plaintiffs' entry into the United States, the type of visa issued to them, the provisional titles they held at the N.Y.C. Human Resources Administration, their annual salaries and the dates their names last appeared on the City payroll are as set forth in Schedule submitted

Statement Under Rule 9(g) of the General Rules of United States Court for the Southern and Eastern Districts of New York

with defendants' Answer and herewith incorporated by reference.

5. The documents annexed to defendants' Answer as Exhibits "1" through "4" are in fact the "Requests For Approval of Provisional Exceptional, Seasonal, Temporary, or Military Replacement Appointment" submitted to the N.Y.C. Department of Personnel by the plaintiffs.

6. None of the plaintiffs was certified pursuant to 8 U.S.C. § 1182 (a)(14) or related provisions of the Immigration and Nationality Act of 1952 for the position he held in the City civil service or for any similar position in the private sector.

7. From the time of plaintiffs' provisional appointments down to date, no waivers of United States citizenship authorized by Civil Service Law § 53, subd. 2 have been in effect with respect to the competitive class titles in which plaintiffs were employed.

8. Between February 11, 1971 and March 5, 1971, plaintiffs were advised that they were dismissed from the N.Y.C. Human Resources Administration subject to continuation on payroll status until accrued annual leave and compensatory time had been paid.

9. Plaintiffs' dismissals were affected pursuant to N.Y. Civil Service Law § 53 with the exception that plaintiff Castro was dismissed for the additional reason that she lacked sufficient experience to qualify for the position of Senior Human Resources Technician.

Statement Under Rule 9(g) of the General Rules of United States Court for the Southern and Eastern Districts of New York

10. Plaintiff Dougall took and passed a competitive examination for the title he held provisionally with the N.Y.C. Human Resources Administration. However, at the time of his dismissal, plaintiff Dougall retained his provisional status.

11. There are eligible lists in existence for all the titles formerly held by the plaintiffs except the title of Typist. An eligible list of this title will be established shortly.

12. The persons whose names appear or will appear on the aforesaid eligible lists are United States citizens and are otherwise fully qualified for appointment.

Respectfully submitted,

J. LEE RANKIN
J. Lee Rankin
Corporation Counsel
Attorney for Defendants
Sugarman and Bronstein

Affidavit of Seham el-Araby**THE UNITED STATES DISTRICT COURT,****SOUTHERN DISTRICT OF NEW YORK.**

[SAME TITLE]

STATE OF NEW YORK { ss.:
COUNTY OF NEW YORK }

SEHAM el-ARABY, being duly sworn, deposes and says that:

1. Deponent is an alien residing in the United States since July 20, 1968, and presently lives at 67 Eighth Avenue, New York, New York.

2. Until May 28, 1971, deponent was employed as a caseworker for the Department of Social Services of the City of New York, at which time her employment was terminated.

3. On May 26, 1971, deponent received from Jules Sugarman, Commissioner, Human Resources Administration of the Department of Social Services, a letter indicating that deponent's employment with the Department would be terminated on May 28, 1971.

4. On May 26, 1971, deponent filed a complaint with the State Division of Human Rights, charging the Department of Social Services with unlawful discriminatory practices relating to employment by denying her equal terms, conditions and privileges of employment because of her national origin, in violation of the Human Rights Law of the State of New York (case number IC-C-472-71).

Affidavit of Rajinder Singh

5. Deponent received on June 25, 1971 from the Division of Human Rights an order marked DETERMINATION AND ORDER AFTER INVESTIGATION on case number ID-C472-71, dismissing her complaint, explaining that deponent could not be reclassified to civil service status because of her Alien status under the requirements set forth by the New York City Civil Service Commission.

(Sworn to by Seham el-Araby on July 12, 1971.)

Affidavit of Rajinder Singh

THE UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

RAJINDER SINGH, being duly sworn, deposes and says:

1. That Deponent is an alien lawfully residing in the United States since June 13, 1961, and presently living at 16 Poplar Street, Jersey City, New Jersey.
2. That until May 28, 1971, Deponent was employed as a full-time case worker with the Department of Social Services of the City of New York.
3. That Deponent was informed by Mr. Modell of the Personnel Division of the Department of Social Services

Affidavit of Rajinder Singh

in December, 1970, that he could not attain permanent civil service status solely because he was an alien.

4. That because Deponent was a provisional employee without tenure, his employment was terminated on May 28, 1971.

5. That Deponent informed the Department of Social Services of his alien status at the time he was first employed sometime in December, 1968, and filed a certificate of intention to become an American citizen with the United States Department of Immigration and Naturalization, and will become entitled to citizenship sometime in August, 1972.

6. That Deponent fully and satisfactorily performed the duties and responsibilities of his office up to the date of his separation, and that Deponent received an excellent service rating from his supervisor, Mr. Robinson, sometime in November, 1969.

7. That despite reasonable efforts to obtain employment, Deponent has remained unemployed since May 28, 1971.

8. That Deponent's separation was based solely on his alienage and was in no way related to his period of service or to the quality of his performance.

(Sworn to by Rajinder Singh on July 12, 1971.)

Opinion of Three-Judge Court
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[S A M E T I T L E]

Three Judge Court
 J. Edward Lumbard, C. J.
 Edward C. McLean, D. J.
 Charles H. Tenney, D. J.

APPEARANCES:

For Plaintiffs:

MOBILIZATION FOR YOUTH LEGAL SERVICES, INC.
 759—10th Avenue
 New York, N. Y.

Lester Evens

Jeffrey G. Stark, Esqs.—of Counsel.

For Defendants:

Louis J. Lefkowitz, Attorney General of the
State of New York

Joel Lewittes, Esq., Assistant Attorney General
—of Counsel.

J. Lee Rankin, Esq., Corporation Counsel
of The City of New York

Municipal Building

New York, N. Y.

Judith A. Gordon, Esq.—of Counsel.

Opinion of Three-Judge Court

TENNEY, *District Judge*

Plaintiffs are four of approximately twenty permanent resident aliens who, prior to December 28, 1970, were employed by private organizations which were merged into the New York City Human Resources Administration on that date. The City program was directed to the improvement of job skills among the unemployed and the underemployed. When the private organizations were merged into the City program, plaintiffs were hired by the City assured their positions and salaries would be the same.¹ Shortly after their City employment commenced, however, plaintiffs were discharged pursuant to New York Civil Service Law § 53.1 (McKinney 1959), solely because of their alienage.²

On May 11, 1971, by order to show cause plaintiffs, alleging that Section 53 violated the Equal Protection Clause of the fourteenth amendment, the Supremacy Clause of the Constitution, and their right to travel among the states,³ moved for the convening of a three-judge court and other relief. The single district judge found plaintiffs raised a substantial constitutional question and recommended the convening of a three-judge court. Pursuant to the May 26, 1971 order of Chief Judge Henry J. Friendly, plaintiff's motions for declaratory judgment, injunctive relief and determination of class action⁴ were submitted to this statutory three-judge court which heard argument on July 13, 1971.⁵

The issues raised by the instant action were recently the subjects of *Graham v. Richardson*, 403 U. S. 365 (1971), in which the Supreme Court held that state laws conditioning welfare assistance either on United States citizenship or, if the beneficiary was an alien, upon his having resided in the United States for a specified number of years were invalid. The rationale and holding of *Graham* control the outcome of plaintiffs' challenge to Section 53.

Opinion of Three-Judge Court

The fourteenth amendment provides "nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws", and the Equal Protection Clause has long been held to apply to aliens as well as citizens. *E.g.*, *Yick Wo v. Hopkins*, 118 U. S. 356, 369 (1886). Of course, a state has traditionally been permitted to make classifications provided these have a reasonable basis. *E.g.*, *Dandridge v. Williams*, 397 U. S. 471, 485 (1970). Nevertheless, when a state's classification either impinges upon a fundamental right, *Shapiro v. Thompson*, 394 U. S. 618 (1969), or is based upon an inherently suspect classification such as race, nationality or alienage, that classification is subject to "close judicial scrutiny". *Graham, supra* at 372. Inasmuch as defendants have failed to demonstrate a compelling interest which would justify the classification created by Section 53, the statute violates the Equal Protection Clause of the fourteenth amendment.

The City and State attempt to justify their refusal to allow aliens the opportunity to compete for employment in the competitive class of civil service (hereinafter referred to as "CCCS") on two grounds: (1) a government is entitled to conduct its affairs through the agency of persons with undivided loyalty, and (2) Section 53 is properly related to efficient and stable government administration.

Since defendants neither elaborate on their loyalty argument nor contend that aliens, as persons with dual allegiance, are security risks,* it would appear that this justification is an application of the special public interest doctrine which is a phrase to describe the state's restricting the distribution of its limited resources to its own citizens. "*Takahashi v. Fish & Game Commission*, 334 U. S. 410 (1948), however, cast doubt on the continuing validity of the special public interest doctrine in all contexts." *Graham, supra* at 374 (emphasis supplied); accord, *Purdy*

Opinion of Three-Judge Court

& Fitzpatrick v. State, 79 Cal. Rptr. 77, 456 P.2d 645, 657-58 (1969).

The Court in *Graham, supra* at 374, concluded that an alien's constitutional right to equal protection could not be made to depend upon the concept that government benefits were a privilege, not a right, which is the basis of the special public interest doctrine, see *People v. Crane*, 214 N.Y. 154, 164, 108 N.E. 427, 430, *aff'd*, 239 U. S. 195 (1915), especially since resident aliens are subject to the same obligations as citizens, such as taxes and military service. *Accord, Purdy & Fitzpatrick*, 456 P.2d at 656. The arbitrariness and unfairness of denying aliens the employment benefits of the City and State are even more apparent when one realizes that an alien who may have resided in New York for a number of years and contributed to its growth and development is denied the opportunity to compete for employment in CCCS whereas any *United States citizen* (vis-a-vis an American citizen residing in New York) who may not be or have ever been a New York resident and, accordingly, may not have made any contribution to it, is eligible for such employment. *Purdy & Fitzpatrick*, 456 P.2d at 656. Therefore, without a showing by defendants that the "loyalty" requirement bears a relationship to a compelling interest of the City and State, it violates the Equal Protection Clause.

The second justification for Section 53—that it is properly related to efficient and stable government administration—also does not withstand "close judicial scrutiny". Defendants contend that an alien is less likely to remain in the United States during his employment life than is an American citizen and, thus, if an alien is hired into a "career" position of CCCS, a decision to return to his homeland will adversely affect the efficiency and stability of the administration of the governments of the City and State. However, this argument of defendants is inap-

Opinion of Three-Judge Court

posite since it is primarily concerned with whether or not a "career" employee is likely to remain in the United States rather than in New York. There is no offer of proof on this issue and defendants would be hard pressed to demonstrate that a permanent resident alien who has resided in New York or the surrounding area for a number of years, as have plaintiffs, and whose family also resides here, would be a poorer risk for a career position in New York (vis-a-vis in the United States) than an American citizen who, prior to his employment with the City or State, had been residing in another state. Judicial notice can be taken of the mobility of today's society and of the numerous persons who flock to places such as New York City and Washington, D.C. for relatively short stays in order to gain valuable experience through government employment or for the adventure and glamour those cities offer. Inasmuch as the defendants do not attempt to distinguish among United States citizens in their hiring of "career" employees, their argument for discriminating against aliens is not valid. Assuming, *arguendo*, that it were valid, it still cannot withstand the requirements of the fourteenth amendment as enunciated in *Graham*.

This efficiency argument of the City and State is an economic one—if the defendants hire aliens into career positions and the aliens eventually quit and return to their homelands, new employees will have to be hired and trained to replace the experienced and therefore more efficient departed aliens; all of which costs defendants money. Again, however, as pointed out above in response to the "loyalty" argument, aliens pay taxes and often contribute to the welfare of the city and state in which they reside—certainly more than do American citizens residing in another state or section of the country and, therefore, discriminating against aliens on economic grounds is particularly inappropriate. Furthermore, a state may

Opinion of Three-Judge Court

not attempt to limit expenditures by creating invidious distinctions among persons within the state without violating the Equal Protection Clause, and the Supreme Court in *Graham, supra* at 375, so held: "[A] concern for fiscal integrity is no . . . justification for the questioned classification in these cases. . . ."

Although *Graham* did not explicitly overrule two early Supreme Court cases, *Crane v. New York*, 239 U.S. 195 (1915); *Heim v. McCall*, 239 U.S. 175 (1915), which are admittedly factually similar to the instant action and which upheld a New York statute prohibiting employment of aliens on public works, they are no longer controlling. In *Purdy & Fitzpatrick, supra*, the California Supreme Court was faced with a challenge to a statute virtually identical to that in *Crane* and *Heim* and unanimously held that the statute was violative of the Equal Protection Clause. In doing so, the court concluded that the original basis for the result in *Heim* was invalid and that recent developments in the law of equal protection had removed whatever validity *Heim* had at the time of its decision and that *Takahashi* warranted the rejection of such cases as *Heim* and *Crane*. If there were any doubt about the legitimacy of that California decision, it should have been put to rest by *Graham* which also strongly criticized the rationale of *Crane* and *Heim* and rejected it as a basis for denying welfare benefits to aliens. Taken together, *Graham* and *Takahashi* sufficiently weaken the value of *Crane* and *Heim* as precedents for upholding state laws denying aliens government employment and, therefore, those cases can be viewed as implicitly overruled and no longer law. That *Graham* did not explicitly overrule *Crane* and *Heim* can be viewed only as reflecting an intention to defer such action until faced with a proper factual setting in which states were given an opportunity to present their justifications for denying aliens employment opportunities. We are now faced with

Opinion of Three-Judge Court

such a case and the City and State have failed to offer sufficient justification for Section 53; accordingly, we have adopted the reasoning of *Graham* and hold Section 53 violative of the Equal Protection Clause.

In the opinion of this Court, Section 53 is also unconstitutional because it conflicts with the Supremacy Clause of the Constitution. Specifically, Congress has enacted a comprehensive plan for the regulation of immigration and naturalization and has granted to aliens through 42 U.S.C. § 1981 (1970) 'the full and equal benefits of all laws in this country. "Moreover . . . [the Supreme] Court had made it clear that . . . aliens lawfully within this country have a right to enter and abide in any State in the Union 'on an equality of legal privileges with all citizens under non-discriminating laws.' *Takahashi*, 334 U.S. at 420." *Graham*, *supra* at 377-78. Relying on these premises, the court in *Graham* concluded that state laws restricting the eligibility of aliens for welfare assistance solely because of their alienage conflicted with the federal policy and hence were unconstitutional. Section 53 is invalid for the same reasons.

In *Truax v. Raich*, 239 U.S. 33, 42 (1915), the court reasoned:

"The authority to control immigration—to admit or exclude aliens—is vested solely in the Federal Government. . . . The assertion of an authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the State would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work. And, if such a policy were permissible, the practical result would be that those lawfully admitted to the country under the authority of Congress, instead of enjoying in a substantial sense and in their full scope the privileges conferred by the admission,

Opinion of Three-Judge Court

would be segregated in such of the States as chose to offer hospitality." *Accord, Graham, supra* at 14.

In quoting the above language from *Truax* with approval, the court in *Graham, supra* at 380, held:

"State alien residency requirements, that either deny welfare benefits to noncitizens or condition them on longtime residency, equate with the assertion of a right, inconsistent with federal policy, to deny entrance and abode. Since such laws encroach upon exclusive federal power, they are constitutionally impermissible."

Just as the laws in *Truax*⁸ and *Graham* equated with a right in the states to admit and exclude aliens, an exclusively federal right, Section 53 encroaches upon this exclusively federal power and denies aliens the "full and equal benefit of all laws for the security of persons and property." Since the federal government has preempted the field in the case of denying aliens welfare assistance, it has done so in the instant one. Any alien who would be discouraged from residing in a state because it either denied or conditioned upon long-term residency his right to welfare assistance would likewise be discouraged from residing in New York because of Section 53. Such an alien could logically conclude that his best or possibly his only opportunity for equal opportunity employment would be with the governments of the City and State, and to him Section 53 would constitute a serious obstacle to either his entrance and/or abode in New York. In fact, Section 53 could be viewed as reflective of a more pervasive state policy to discriminate against aliens and hence to have established additional artificial barriers to the entrance and abode of aliens.

Opinion of Three-Judge Court

In sum, Section 53 is tantamount to an assertion by New York City and the State of New York of the right to deny aliens entrance and abode—a right that is exclusively federal. Furthermore, Section 53 is clearly violative of 42 U.S.C. § 1981 (1970) in that it denies aliens the equal benefits of the laws of New York as are enjoyed by white citizens. In light of the language of *Graham*, this Court is constrained to find that Section 53 also conflicts with the Supremacy Clause and is unconstitutional, and enforcement of it will be enjoined.

Accordingly, plaintiff's motion for class action, preliminary and permanent injunctive and declaratory relief is hereby granted.

Settle order on notice.

Dated: New York, New York, November 9, 1971.

J. EDWARD LUMBARD
C.J.

EDWARD C. MCLEAN
D.J.

CHARLES H. TENNEY
D.J.

Opinion of Three-Judge Court

LUMBARD, *Circuit Judge* (concurring)

I concur in Judge Tenney's opinion. The city and state have offered no justification for New York Civil Service Law § 53 that can stand in light of the Supreme Court's opinion in *Graham v. Richardson*, 403 U.S. 365 (1971). I think that the "special public interest" doctrine and the Court's earlier decisions in *Heim v. McCall*, 239 U.S. 175 (1915), and *Crane v. New York*, 239 U.S. 195 (1915), can no longer be viewed as controlling in light of the Court's language in *Graham v. Richardson*, *supra*, and *Takahashi v. Fish & Game Commission*, 334 U.S. 410 (1948). Not only does Section 53 run afoul of the Equal Protection Clause, but it conflicts both with 42 U.S.C. § 1981 (1970) and the federal government's general power over the immigration and naturalization of aliens. See *Graham v. Richardson*, *supra*, at 376-80.

While the question we decide today is an important one, it is equally important to recognize those areas into which the Court's holding does not extend. Nothing in our decision should be construed to mean that a state may not lawfully maintain a citizenship requirement for those positions where citizenship bears some rational relationship to the special demands of the particular position. There are some positions in the civil service, as in elective office, where broad policy decisions are made as a matter of course, and in such positions the state and the city, and their citizens, may properly require the officeholders to be a United States citizen.

Opinion of Three-Judge Court

Patrick Mc L. Dougall, Esperanza Jorge, Teresa Vargas,
and Sulvia Castro, individually and on behalf of all
persons similarly situated, Plaintiffs,

against

Jule M. Sugarman, Administrator of New York City
Human Resources Administration and Harry I. Bron-
stein, City Director of Personnel and Chairman of the
New York City Civil Service Commission, Defendants.

71 CIVIL 992

FOOTNOTES

¹ Pg. 2. Plaintiffs Jorge and Vargas were employed as clerk-typists; plaintiff Castro as a senior human resources technician; and plaintiff Dougall as an administrative assistant in the staff development unit.

² Pg. 2. Section 53.1 provides:

"Except as herein otherwise provided, no person shall be eligible for appointment for any position in the competitive class unless he is a citizen of the United States."

³ Pg. 2. We have not found it necessary to reach the question whether aliens have a constitutional right to travel among the states.

⁴ Pg. 2. Plaintiffs' motion for class action determination is granted; the class shall consist of all permanent resident aliens residing in New York State who, but for the enforcement of Section 53, would otherwise be eligible to compete for employment in the competitive class of Civil Service.

⁵ Pg. 2. Jurisdiction of this court is based upon 28 U.S.C. § 1343(3) and (4). Reference is also made to 42 U.S.C. §§ 1981 and 1983, 28 U.S.C. §§ 2201, 2281 and 2284.

⁶ Pg. 4. Defendants would be on particularly shaky ground if they were to argue that aliens were ineligible for employment in CCCS because they are security risks. In fact, defendant argued in support of Section 53's validity that plaintiffs, as aliens, were eligible for other government employment in the generally higher paying and more responsible appointive positions, as well as in the labor class. E.g., N.Y. Civil Service Law §§ 35, 41, 42 and 43 (McKinney 1959). Furthermore, Section 53.2 specifically allows the state to temporarily waive the citizenship requirements during a shortage of qualified

Opinion of Three-Judge Court

citizens. In light of the availability of more responsible positions to aliens and that defendants may waive the citizenship requirements when it suits their needs, it would be incongruous to contend that aliens were denied employment in CCCS because their dual allegiance constituted a security risk to the City and State.

⁷ Pg. 8. 42 U.S.C. § 1981 (1970) provides:

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to . . . the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens. . . ."

This provision was previously 8 U.S.C. § 41, a section of that title of the United States Code dealing with Aliens and Nationality. It is also clear that 8 U.S.C. § 41 extended to aliens as well as citizens. *Takahashi*, 334 U.S. at 419.

⁸ Pg. 10. There is language in *Truax*, 239 U.S. at 41, which implies that states may deny some employment opportunities to aliens without invading this exclusive federal authority as long as it does not foreclose nearly the entire field of industry. Defendants then argue that since they employ only about 5 per cent of the state workforce, Section 53 is valid. However, the facts of *Sailor v. Loser*, the companion case to *Graham*, clearly demonstrate that a state law need have very little actual impact on aliens before it constitutes an impermissible encroachment upon the exclusive federal power to admit and exclude aliens. In *Sailor*, the class of persons actually affected by the denial of welfare assistance represented only 65-70 cases annually. Certainly Section 53 imposes at least as great an obstacle to the entrance and abode of aliens as did the statute in *Sailor*, since there are apparently in excess of 500,000 aliens residing in New York. *Plaintiffs' Brief* at 7.

Order of Three-Judge Court

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

[S A M E T I T L E]

Three-Judge Court

J. Edward Lumbard, C.J.,
Edward C. McLean, D.J.
Charles H. Tenney, D.J.

This cause having come to be heard before a statutory three-judge court convened pursuant to 28 U.S.C. § 2281 by order of the Honorable Henry J. Friendly, Chief Judge of the Second Circuit Court of Appeals, dated May 26, 1971, and consisting of the Honorable J. Edward Lumbard, Circuit Judge, the Honorable Edward C. McLean, District Judge, and the Honorable Charles H. Tenney, District Judge, on plaintiffs' motion for an order determining that this action may proceed as a class action declaring N.Y. Civil Service Law § 53 unconstitutional and enjoining enforcement thereof, and the three-judge court having considered the pleadings, affidavits and briefs submitted on behalf of the parties, having heard oral argument on July 13, 1971, and having rendered its decision in an opinion dated November 9, 1971, it is

ORDERED that plaintiffs Dougall, Jorge and Vargas are representatives of a class consisting of all permanent resident aliens who, but for the enforcement of N.Y. Civil Service Law § 53, would otherwise be eligible to compete for employment in the competitive class of civil service; and it is further

Order of Three-Judge Court

ORDERED that N.Y. Civil Service Law § 53 is declared unconstitutional; and it is further

ORDERED that defendants, their successors in office, agents and employees and all other persons in active concert with them are permanently enjoined from enforcing N.Y. Civil Service Law § 53; and it is further

ORDERED that this three-judge court is hereby dissolved and all claims for relief are remanded to the single district judge to whom the motion for the convening of a three-judge court was originally presented, the Honorable Charles H. Tenney; and it is further

ORDERED that execution of this order is stayed pending a timely appeal by the defendants to the United States Supreme Court.

Dated: New York, New York, December 23, 1971.

J. EDWARD LUMBARD, C.J.

EDWARD C. McLEAN, D.J.

CHARLES H. TENNY, D.J.

Notice of Appeal of Municipal Defendants

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[S A M E T I T L E]

NOTICE OF APPEAL TO THE SUPREME COURT OF
THE UNITED STATES

SIRS:

PLEASE TAKE NOTICE that the defendants, JULE M. SUGARMAN, Administrator of New York City Human Resources Administration, and HARRY I. BRONSTEIN, City Director of Personnel and Chairman of the New York City Civil Service Commission hereby appeal to the Supreme Court of the United States from the order of Three Judge Court, dated the 23rd day of December 1971 and entered in the office of the Clerk of the United States District Court, Southern District of New York on the same day which, among other things, declared N.Y. Civil Service Law, Section 53 unconstitutional and directed that the defendants, their successors in office, agents and employees and all other persons in active concert with them are permanently enjoined from enforcing N.Y. Civil Service Law, Section 53, and dissolved the three-judge court and remanded the matter to the single district judge to whom the motion for the convening of a three-judge court was originally presented, and the said defendants hereby appeal from each and every part of said order except so much as stays the execution of the order.

The order was entered on December 23rd, 1971.

Notice of Appeal of Municipal Defendants

This appeal is taken pursuant to 28 U.S.C. Section 1253.

Dated: New York, January 19th, 1972.

Yours, etc.

J. LEE RANKIN
*Corporation Counsel
of The City of New York
Attorney for Defendants
Sugarman and Bronstein
Office and P.O. Address
Municipal Building
Borough of Manhattan
New York, N. Y. 10007*

To:

M.F.Y. LEGAL SERVICES, INC.
LESTER EVENS, JEFFERY G. STARK, Esqs.
759 Tenth Ave.
New York, N. Y.
Attorney for Plaintiffs

HON. LOUIS J. LEFKOWITZ
*Attorney General of the State of New York
Attorney for State of New York
Joel Lewittes, Esq., Asst. Atty. General
80 Centre St.
New York, N. Y. 10013*

**Notice of Appeal of Attorney General of the
State of New York**

**UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.**

[SAME TITLE]

**NOTICE OF APPEAL TO THE SUPREME COURT OF
THE UNITED STATES**

Notice is hereby given to the plaintiffs above-named that LOUIS J. LEFKOWITZ, Attorney General of the State of New York, hereby appeals to the Supreme Court of the United States from the final order granting plaintiffs' motion for class action, preliminary and permanent injunctive and declaratory relief entered in this action on December 23, 1971.

The appeal is taken pursuant to 28 U.S.C. § 1253.

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
By

JOEL LEWITTES
Assistant Attorney General
80 Centre Street
New York, New York 10013
Tel. No. (212) 488-3284

*Notice of Appeal of Attorney General of the
State of New York*

To:

MOBILIZATION FOR YOUTH LEGAL SERVICES, INC.
Attorneys for Plaintiffs
759 Tenth Avenue
New York, New York

HON. J. LEE RANKIN
Corporation Counsel of the City of New York
Attorney for Defendants
Municipal Building
New York, New York 10007
Att: Judith A. Gordon, Esq.
Assistant Corporation Counsel

